FILED

961772 MAY 6 1997

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STEPHEN FLICK,

Petitioner,

vs.

WEDDINGTON PRODUCTIONS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

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48 pp

QUESTIONS PRESENTED

1. Does the Copyright Act, 17 U.S.C. §301, preempt a state court's subject matter jurisdiction to preliminarily enjoin and punish, as a contempt of court, in the course of adjudicating state law property rights, the reproduction of copyrightable subject matter (here, sound effects used in the motion picture "Twister")?

2. What is the legal standard under the preemption provision of the Copyright Act, 17 U.S.C. §301, to be used in determining whether section 301 deprives a state court of subject matter jurisdiction?

PARTIES TO THE PROCEEDING

The parties are Stephen Flick, Steve Flick's Creative Cafe, a California corporation, Dean Beville and Weddington Productions, Inc, a California corporation. Pursuant to Supreme Court Rule 29.6, the corporate parties have no parent companies or non-wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

ORDERS BELOW

The Order of the Superior Court of the State of California for the County of Los Angeles adjudicating Stephen Flick in contempt of court is reprinted at Appendix A. The Order of the Court of Appeal of the State of California, Second Appellate District, Division 2 denying the Petition for Writ of Habeas Corpus, etc. is reprinted at Appendix B. The Order of the Supreme Court of the State of California denying review is reprinted at Appendix C.

JURISDICTION

The Order of the Los Angeles Superior Court adjudicating petitioner in contempt of court for violation of a preliminary injunction was issued on November 26, 1996. On January 3, 1997, the Court of Appeal of the State of California, Second Appellate District, Division Two, denied petitioner's Petition for Writ of Habeas Corpus - Mandate - Prohibition. On February 5, 1997, the Supreme Court of California denied petitioner's Petition for Review.

This Petition for Certiorari is filed within ninety days of the entry of the California Supreme Court's Order denying review, as provided by 28 U.S.C. §2101(c) and United States Supreme Court Rule 13.1. The jurisdiction of this Court to review the judgment is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitution of the United States, Article I, Section 8 provides, in pertinent part:

> The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

The Constitution of the United States, Article VI, Clause 1 provides, in pertinent part:

> This Constitution and the Laws of United States, which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.

United States Code, Title 28, Section 1338 provides, in pertinent part:

> (a) The District Court shall have original jurisdiction of any civil action arising under any Act of Congress relating to ... copyrights .... Such jurisdiction shall be exclusive of the courts of the states in ... copyright cases.

The Copyright Act, United States Code, Title 17, Section 301 provides, in pertinent part, as follows:

> (a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

STATEMENT OF THE CASE

Petitioner Stephen Flick is a highly regarded motion picture sound effects editor with more than twenty years of experience in his field. He has received two Academy Awards for "Best Sound Effects" and has been nominated to receive Academy Awards for his work on three other motion pictures.

Petitioner was a founding shareholder of respondent Weddington Productions, Inc. ("Weddington") which was formed to continue providing the motion picture sound effects editing services previously provided by petitioner and the other shareholders of Weddington. In the course of rendering services as a sound effects editor over the years, petitioner and the other shareholders of Weddington developed and repeatedly used a library of sound effects.

In 1995, petitioner and the other shareholders of Weddington fell into dispute and, thereafter, separately conducted their businesses of rendering sound effects editing services. On December 13, 1995, Weddington filed in the Los Angeles Superior Court a Verified Complaint for Breach of Fiduciary Duty, Claim and Delivery, Conversion, Unfair Competition, Interference With Prospective Economic Relationship, Accounting, Common Counts and Injunctive Relief. No claim for copyright infringement was alleged. On January 12, 1996, petitioner filed his answer to the complaint.

Thereafter, Weddington moved for a preliminary injunction to enjoin petitioner's continued use of the sound effects library. The Los Angeles Superior Court granted that motion and, on January 29, 1996, entered the preliminary injunction (the "Injunction") which formed the subject matter of the subsequent contempt proceeding and lies at the heart of this petition.[1] The Injunction provides, in pertinent part, as follows:

> **B. Injunction**
>
> 1. Defendants, Flick, Creative Cafe, Beville, and each of them, and their agents, servants, employees and representatives shall be and hereby are enjoined and restrained, during the pendency of this action, from engaging in, committing or performing directly any and all of the

---

[1] The Injunction is reprinted at Appendix D.

following acts:

> (a) Utilizing the Library for any information contained therein; ...

The "Library" was defined in the Injunction as consisting of the various tangible media or personal property in which copyrightable sound effects were embodied:[2]

> For purposes of this Preliminary Injunction, the Sound Effects Library of Weddington (the "Library") include the following:
>
> (a) The digital master tape and other media (collectively "the Master Tape") on which the Library is stored;
>
> (b) The computer data base including the relational data base program and

---

[2] Petitioner does not contend that the Los Angeles Superior Court lacked subject matter jurisdiction to enjoin disposition of the tangible personal property of which the Library consisted, as opposed to enjoining exercise of the specific rights of a copyright proprietor under 17 U.S.C. §106 as to copyrightable subject matter. Title 17, United States Code, section 202 provides, in pertinent part: "Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied."

attendant data files that are used for searching, cataloguing and organizing the sound effects;

(c) The computer catalogue collection of master audio recordings;

(d) The physical media on which the master sounds are recorded and stored consisting primarily of digital audio tape ("DAT");

(e) All versions of the current sound recording media including DAT, ¼" reel to reel tape, 35mm magnetic rolls, 8mm Exabite tape, 2" 24 track analog tape, cassette tape, and all other forms of sound recording media;

(f) all copies of each of the foregoing;

(g) all storage cabinets for each of the foregoing.

In May of 1996, the Los Angeles Superior Court issued an Order to Show Cause Re Contempt against petitioner and the other defendants based upon Weddington's showing that Petitioner had reproduced certain sound effects in the Library. In June of 1996, the evidentiary phase of the contempt trial was held, although closing briefs were not then submitted.

At the trial, Weddington's only proof was that

Petitioner reproduced the sound effects in the Library and created derivative works based thereon while rendering his services as the supervising sound effects editor on the theatrical motion picture, "Twister". Such conduct constitutes exercise of the exclusive rights of a copyright proprietor under 17 U.S.C. §106 as to copyrightable subject matter.

After the evidentiary phase was completed, the contempt trial was abated to allow the parties to mediate and, thereafter, reinstated by the Court. The parties then filed their closing briefs in connection with the contempt trial.

On November 26, 1996, the Los Angeles Superior Court issued its Minute Order and Order holding petitioner in contempt of court for violating Paragraph B.1(a) of the Injunction. That order contained no preemption analysis at all; the Los Angeles Superior Court offered only its conclusion that the state court contempt proceeding was not "precluded or preempted".

In pertinent part, the Los Angeles Superior Court's Order stated as follows:

> ... Nor does the injunction "adjudicate" rights of a copyright proprietor (ref. Opposition Brief, p. 10, 11, 12-23).
>
> There is no "exclusive federal jurisdiction" over this proceeding. The Federal Copyright Act does not preclude or preempt this state court contempt proceeding.

> The evidence has shown beyond a reasonable doubt that Stephen Flick at all times had the ability to comply with the order but nevertheless utilized the subject Sound Library on the movie "Twister" on sixteen occasions during March 24 and 28, 1996, and that the use was intentional and willful.

If, as Petitioner contends, the Los Angeles Superior Court was without subject matter jurisdiction to issue or to enforce the Injunction, the contempt adjudication must be reversed, as this Court held in *In re Green's Petition*, 369 U.S. 689, 82 S.Ct. 1114, 8 L.Ed.2d 198 (1962):

> For, as *Amalgamated Association of St. Elec. Ry. & Motor Coach, etc. v. Wisconsin Employment Relations Board, supra*, held, a state court is without power to hold one in contempt for violating an injunction that the state court had no power to enter by reason of federal pre-emption. 396 U.S. at 692, 82 S.Ct. at 1117.

Petitioner Stephen Flick was sentenced on December 23, 1996 by the Los Angeles Superior Court to pay a fine of $16,000 and later was ordered to pay attorneys' fees of $15,000 incurred by Weddington in connection with the contempt proceedings.

Petitioner sought relief from the Court of Appeal of the State of California, Second Appellate District, Division Two, by way of Petition for Writ of Habeas Corpus, etc. Upon the denial of that Petition, petitioner sought relief from the Supreme Court of the State of California by way

of Petition for Review After Denial of Petition for Writ of Habeas Corpus, etc. That Petition, too, was denied.

THE STAGE OF PROCEEDINGS AT WHICH THE FEDERAL QUESTION WAS FIRST RAISED

Petitioner first raised the federal question as to the Los Angeles Superior Court's lack of subject matter jurisdiction to issue or to enforce the Injunction by way of Motion to Dissolve and/or Modify Injunction, filed November 8, 1996, after the contempt proceedings had been reinstated by the Los Angeles Superior Court on October 17, 1996. Petitioner continued to raise the issue in his Brief of Stephen Flick and Steve Flick's Creative Cafe in Opposition to Contempt Proceedings, filed in the Los Angeles Superior Court on November 14, 1996 as part of the final briefing in connection with the contempt trial. Thereafter, petitioner raised this issue in the California Court of Appeal and California Supreme Court, as his primary argument.

REASONS FOR GRANTING THE WRIT

I.

THE VARIOUS STATE AND FEDERAL COURTS ARE USING DIFFERENT LEGAL STANDARDS TO DETERMINE WHETHER STATE LAW CLAIMS ARE PREEMPTED UNDER THE COPYRIGHT ACT AND REACHING INCONSISTENT RESULTS

Both state courts and federal courts are called upon to determine whether claims have been preempted by the Copyright Act, 17 U.S.C. §301. While the Los Angeles Superior Court here completely failed to articulate the standard it used to find that its own jurisdiction was not preempted, other courts have articulated different standards to determine whether preemption is appropriate and have produced conflicting results.

For example, in *Wolff v. Institute of Elec. & Eng.*, 768 F.Supp. 66 (S.D.N.Y. 1991), a photographer brought suit against a magazine alleging both copyright infringement and breach of contract. The breach of contract claim was based upon a breach of provision for one-time use of a photograph in the contract between the parties by defendants' subsequent use of the subject photograph. The United States District Court for the Southern District of New York used the following standard in holding that the cause of action for breach of contract was preempted by 17 U.S.C. §301 of the Copyright Act:

> State causes of action are "equivalent" to the exclusive rights within copyright law, and accordingly pre-empted by that statute,

> unless they are "qualitatively different" from the rights granted under the Copyright Act. (citations) In the case at bar, IEEE [defendant] breached its contract with plaintiffs, embodied in the stock photo invoice, by infringing plaintiffs' copyright. It is difficult to see how the resulting claims are qualitatively different. Accordingly the breach of contract claim is pre-empted. 786 F.Supp. at 69.

In *National Car Rental v. Computer Associates*, 991 F.2d 426 (8th Cir.), *cert. denied*, __ U.S. __, 114 S.Ct. 176, 126 L.Ed.2d 136 (1993), the Court of Appeals reversed the trial court's finding that a cause of action for breach of contract had been preempted by the Copyright Act. The gravaman of the appellant licensor's claim in *National Car Rental* was that the appellee licensee of computer software had used the software to render services to third parties, in violation of a contractual provision limiting use of the software to services for the licensor. The Court of Appeals for the Eighth Circuit relied upon what is sometimes referred to as the "extra element" test in finding that the state law contract claim was not preempted:

> Absent the parties' agreement, this restriction would not exist. Thus, C.A. [licensor] is alleging that the contract creates a right not existing under the copyright law, a right based upon National's promise, and that it is suing to protect that contractual right. The contractual restriction on use of the programs constitutes an extra element that makes this cause of action qualitatively

> different from one for copyright. 991 F.2d at 433.

As a matter of logic, the existence of a contractual promise will always constitute an "extra element", extraneous to the elements of a claim for copyright infringement. Moreover, even where the "extra element" test is applied, applications vary and the existence of "extra elements" is only sometimes sufficient to preserve a state court claim from preemption.

In *Acuff-Rose Music, Inc. v. Campbell*, 754 F.Supp. 1150 (M.D. Tenn. 1991), *rev'd on other grounds*, 972 F.2d 1429 (6th Cir. 1992), *rev'd on other grounds*, 510 U.S. 569, 114 S.Ct. 1164 127 L.Ed.2d 500 (1994), the copyright proprietor of a song sued a rap group for copyright infringement and interference with prospective business advantage based upon the rap group's use of a portion of the song. Although the district court found that "[t]o prevail on such a claim, the plaintiff must show malice, ill will, or wrongful motive" - all elements unnecessary to a claim for copyright infringement and therefore "extra", the court nevertheless held the claim for interference to be preempted:

> In addition, the fact that a state law cause of action requires proof of intent does not necessarily preclude a finding of preemption. The Second Circuit concluded in *Harper & Row* that:
>
> > [T]he fact that cross-appellants pleaded additional elements of awareness and

> intentional interference, not a part of a copyright infringement claim goes merely to the scope of the right; it does not establish qualitatively different conduct on the part of the infringing party, nor fundamental nonequivalence between the state and federal rights implicated.

Id. Since the claim is equivalent to rights established by §106 the cause of action is pre-empted by federal law. 754 F.Supp. at 1160.

In *Data General v. Grumman Systems Support Corp.*, 795 F.Supp. 501 (D. Mass. 1992), *aff'd and rev'd, in part, on other grounds*, 36 F.3d 1147 (1st Cir. 1994), the court, in finding preemption of a state law claim for unjust enrichment, employed a two-step process:

> State claims are pre-empted if two conditions are met. (citations) First, the work of authorship in which rights are claimed must fall within the subject matter of copyright as defined by §§102 and 103. ...
>
> The second condition is that the state-created right must be equivalent to one of the exclusive rights created by the Copyright Act. 795 F.Supp. at 505.
>
> In determining "equivalency" under the second

condition, the *Data General* court recognized the "extra element" test but noted that even the presence of extra elements is not conclusive. The *Data General* court found that the plaintiff's claim for unjust enrichment, although containing "extra elements", was preempted.

> Count VI of the complaint alleges a claim for unjust enrichment. This claim is for damages for the alleged violation of Data General's exclusive right to control the use of the copyrighted materials, and is thus another repackaged allegation of copyright infringement. Such a claim is pre-empted by federal law. 506 F.Supp. at 795.

In contrast, in *Schuchart & Associates, etc. v. Solo Serve Corp.*, 540 F.Supp. 928 (W.D. Tex. 1982), the court found that the Copyright Act did not preempt the plaintiff's claim for unjust enrichment based upon the defendant's use of copyrighted architectural plans to create new plans for a similar building.

> The rights [under the unjust enrichment claim] plaintiffs seek to enforce are fundamentally different in kind from the exclusive rights in copyrighted works to reproduce a copyrighted work, to prepare a derivative work or to distribute copies of copyrighted work. Plaintiffs seek not to enforce their rights to copy and distribute their plans and drawings. Nor do plaintiffs seek to recover damages analogous to the actual damages provided by §504(b). Rather, Plaintiffs seek to recover under

> *quantum meruit* the value of the services rendered by defendants' use of the plans and specifications prepared by Plaintiff. ... Section 301 has not pre-empted Plaintiff's cause of action for unjust enrichment. 540 F.Supp. at 945.

II.

THIS COURT HAS NOT YET INTERPRETED THE PREEMPTION PROVISIONS OF THE COPYRIGHT ACT, 17 U.S.C. §301. IT SHOULD DO SO NOW.

In *Goldstein v. California*, 412 U.S. 546, 93 S.Ct. 2303, 37 L.Ed.2d 163 (1973), decided prior to the enactment of the Copyright Act of 1976, this Court upheld the validity of a California statute making it a criminal offense to "pirate" sound recordings. In doing so, this Court approved variation among the states in the quantum of protection afforded various works of authorship.

> Although the Copyright Clause thus recognizes the potential benefits of a national system, it does not indicate that all writings are of national interest or that state legislation is, in all cases, unnecessary or precluded. ... In view of that enormous diversity, it is unlikely that all citizens in all parts of the country place the same importance on works relating to all subjects.

* * *

> ... We do not see here the type of prejudicial conflicts which would arise, for example, if each state exercised the sovereign power to impose imposts and tariffs; nor can we discern a need for uniformity such as that which may apply to the regulation of interstate shipments. 412 U.S. at 558-559, 93 S.Ct. at 2310-2311.

In 1989, in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989), this Court briefly addressed the general subject matter of copyright preemption after the enactment of the Copyright Act in 1976. In interpreting the work for hire provisions of the Copyright Act, this Court recognized the profound impact which the enactment of Section 103 has had with respect to preemption.

> Establishment of a federal rule of agency, rather than reliance on state agency law, is particularly appropriate here given the Act's express objective of creating national, uniform copyright law by broadly preempting state statutory and common law copyright regulation. See, 17 U.S.C. §301(a). We thus agree with the court of appeals that the term "employee" should be understood in light of the general common law of agency. 490 U.S. at 740-741, 109 S.Ct. at 2173.

The "Act's express objective of creating national, uniform copyright law by broadly preempting state statutory and copyright regulation" similarly requires that each of the state and federal courts apply the same standard to deter-

mine whether the subject matter of the action before it has been preempted under 17 U.S.C. §301.

III.

RECENT TECHNOLOGICAL DEVELOPMENT, INCLUDING PUBLICATION ON THE INTERNET AND DESK TOP PUBLISHING, AUGMENT THE NEED FOR NATIONAL UNIFORMITY IN THE EXERCISE OF FEDERAL COPYRIGHT JURISDICTION.

In the years since *Goldstein* was decided in 1973, there has been massive proliferation of computers in American homes, small businesses and large businesses with the associated ability to publish, copy, download, upload, e-mail and post on the Internet copyrightable subject matter. That Americans are fully exploiting these possibilities of the computer age is beyond doubt. America Online, the largest of many providers of access to the Internet, has recently been forced to shut down in order to expand its capacity, as have many of the other providers of access to the Internet.

As a result of this expansion of publishing and communication, through the use of computers, it may be expected that civil actions with respect to use of copyrightable subject matter will arise throughout the United States and form the subject matter of litigation in both the federal and state courts. In fact, many such cases have already arisen.

Thus, not only has Congress now spoken as to the need for "creating national, uniform copyright law by broadly preempting state statutory and common law copyright regulations" since this Court's decision in *Goldstein* but also technological development has created an urgent need for a "uniform copyright law" throughout the 50 states. The first step in establishing such uniformity is application of a uniform test to determine whether state court jurisdiction has been preempted.

IV.

CONCLUSION

This Petition should be granted.

DATED: May 1, 1997

Respectfully submitted,

THOMAS DONIGER
Counsel of Record

DONIGER & FETTER

Attorneys for Petitioner
Stephen H. Flick

APPENDIX A

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

Date:	11/26/96	**Dept.** 85
Honorable	Robert O'Brien	Judge
Honorable		Judge Pro Tem
	NONE	Deputy Sheriff
	DAROLYN JENSEN	Deputy Clerk
	NONE	Electronic Recording Monitor
		Reporter

BC140705

WEDDINGTON PRODUCTIONS, INC
VS
STEPHEN FLICK, ET AL
*SEE PROTECTIVE ORDER DTD. 5-14

r/t BC136515

Plaintiff Counsel — NO APPEARANCES
Defendant Counsel

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED ORDER TO SHOW CAUSE RE: CONTEMPT

The court finds Stephen Flick in contempt of court for violating Paragraph B.1.(a) on the 1/29/96 injunction order on sixteen counts as reflected in ORDER signed and filed this date.

Sentencing is set for 12/27/96 at 9:30 a.m. in Department 85; Stepehn (sic) Flick personally and all counsel are ordered to appear.

Copies of this minute order and above signed ORDER are sent by U.S. Mail this date addressed as follows:

DONIGER & FETTER
606 SO. OLIVE STREET, #530
LOS ANGELES, CA 90014

LEVY, SMALL & LALLAS
815 MORAGA DRIVE
LOS ANGELES, CA 90049-1633

MINUTES ENTERED
11 / 26 / 96
COUNTY CLERK

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

FILED
Los Angeles Superior Court
NOV 26 1996
John A. Clarke, Clerk
/s/ Darolyn Jensen
By Darolyn Jensen, Deputy

WEDDINGTON PRODUCTIONS, INC.,
a California Corporation,
Plaintiff,

vs.

STEPHEN FLICK, etc., et al.,
Defendants.

Case No. BC 140 705

ORDER

The Court had for some time held the contempt proceedings in abeyance, because the parties were apparently close to settling the case. It was anticipated by the parties that if the case was settled, that they would then request the Court to abort these contempt proceedings. The Court was receptive to hearing and ruling on such a request. It appears that it is not settled and the contempt proceedings must be brought to closure.

The January 29, 1996 order is lawful, clear and unambiguous. Each alleged contemnor, Stephen Flick,

and Stephen Flick Creative Cafe, a purported corporation, had specific and direct knowledge of the injunction order.[1]

The responding parties raise an argument as to ownership of the Sound Library (see opposition, p. 12, 11. 3-9, p. 15, 11. 11-23). Even if that was an issue as to whether either of them violated the status quo injunction, it is too late now to raise the argument.

The Court does not herein decide formally whether either party owned the Sound Library or miappropriated (sic) it or other property. This proceeding is limited to whether the alleged contemnors violated the Court's January 29, 1996 order which was given to maintain the status quo while the lawsuit proceeded to completion. Certainly, there was insufficient evidence presented showing that Mr. Flick is the "copyright proprietor." Nor does the injunction "adjudicate" rights of a copyright proprietor (ref. Opposition brief, p. 10, ll. 12-23).

There is no "exclusive federal jurisdiction" over this proceeding. The Federal Copyright Act does not preclude or preempt this state court contempt proceeding.

The evidence is shown beyond a reasonable doubt that Stephen Flick[2] at all times had the ability to comply with the order but nevertheless utilized the subject Sound Library on the movie "Twister" on sixteen occa-

---

[1] Also, each alleged contemnor had direct and specific notice of the OSC re: contempt and supporting papers. Those documents were accepted for service by their attorney of record, Robert L. Becking. There was no evidence rebutting the presumption that they were not notified. See, *In re Sigesmund*, 193 Cal.App.2d 219; *People v. Sup.Ct.*, 230 Cal.App.2d 99. Indeed, no such defense was presented at the contempt trial.

[2] The evidence is unclear as to the distinction between Stephen Flick and Stephen Flick Cafe. Accordingly, the Court considers them one and the same.

sions during March 24 and 28, 1996, and that the use was intentional and willful. Stephen Flick had clear knowledge of the content of the Sound Library and its use. Contrary to the injunction, he willfully violated the injunction.[3]

The Court adjudges Stephen Flick in contempt of court for violating Paragraph B.1.(a) of the January 29, 1996 injunction order sixteen times, thus sixteen counts of contempt.

Stephen Flick is ordered to appear at 9:00 a.m. on December 27, 1996 in Department 85 for sentencing pursuant to Code of Civil Procedure section 1218 and Code of Civil Procedure section 1219. Further, at that time the Court will set the time and manner for determining moving party's request for attorney's fees and costs.

DATED: November 26, 1996

/s/ Robert H. O'Brien
Robert H. O'Brien
Judge of the Superior Court

RHO: dl
E0P45N21.6W1

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[3] The opposing brief refers to a "Declaration of Stephen Flick attached" (p. 10, l. 1). No such declaration is attached. Moreover, evidence relating to that reference would not be accepted at this time as too late. Any such relevant testimony should have been presented at the contempt trial.

APPENDIX B

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 2 DATE: 01/03/97

Doniger & Fetter
Thomas Doniger
606 South Olive Street
Suite 530
Los Angeles, CA. 90014

RE: Flick, Stephen
VS.
S.c.l.a.
Weddington Productions Inc.
2 Criminal B108199
Los Angeles No. BC140705

THE COURT:

The petition for writ of Habeas-Mandate-Prohibition-Stay is denied.

APPENDIX C

2/2 No. B108199
S058416

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
FEB 5 1997
Robert Wandruff Clerk

Deputy

STEPHEN FLICK,
Petitioner

v.

LOS ANGELES SUPERIOR COURT,
Respondent
WEDDINGTON PRODUCTIONS, INC.,
Real Party in Interest

Application for stay and petition for review DENIED.

GEORGE
Chief Justice

APPENDIX D

TOM LALLAS (SBN 66512)
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A Partnership Including Professional Corporations
815 Moraga Drive
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Telephone: (310) 471-3000

Attorneys for Plaintiff
Weddington Productions, Inc.

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

FILED
Los Angeles Superior Court
JAN 29 1996
Clerk
/s/ T. Acuna
By T. Acuna Deputy

WEDDINGTON PRODUCTIONS, INC.,
a California Corporation,
Plaintiff,

v.

STEPHEN FLICK, an individual, STEVE FLICK'S CREATIVE CAFE, a purported corporation, DEAN BEVILLE, an individual; and DOES 1 through 75, Inclusive,
Defendants.

CASE NO. BC 140 705

PRELIMINARY INJUNCTION

DATE: December 29, 1995
TIME: 9:30 a.m.
DEPT:

The Court having read the moving and opposing papers, the declarations and evidence submitted by the parties, and having heard the argument of counsel, and good cause appearing therefore:

IT IS HEREBY ORDERED THAT:

A. DEFINITIONS

For purposes of this Preliminary Injunction:

1. The term "Weddington" shall mean and include Weddington Productions, Inc.

2. The term "Flick" shall mean and include Stephen Flick.

3. The term "Creative Cafe" shall mean and include Steve Flick's Creative Cafe.

4. The term "Beville" shall mean and include Dean Beville.

5. The term "Weddington Customer Lists" shall mean and include any software, diskettes, other computer memory, rolodex files, computer printouts, address lists, documents copied, taken, or removed from Weddington and all other documents of any kind or nature whatsoever that in any way mention, relate to, or refer to any of the following with respect to Weddington's customers.

(a) ~~Customer names;~~ [(a-c) deleted by judge]

(b) ~~Customer addresses;~~

(c) ~~Customer telephone numbers;~~

(d) Notes about the customers;

(e) Information regarding the customers' requirements;

(f) What was discussed with the customer when the customer was contacted by Weddington; and

(g) The name of the individual(s) employed by the customer whom Weddington contacts in Weddington's dealings with the customer.

6. The term "Library" shall mean and include the sound effects library as defined by Exhibit "1" attached hereto and incorporated herein by reference as though set forth in full herein.

B. INJUNCTION

1. Defendants, Flick, Creative Cafe, Beville, and each of them, and their agents, servants, employees and representatives shall be and hereby are enjoined and restrained, during the pendency of this action, from engaging in, committing or performing directly any and all of the following acts:

(a) Utilizing the Library for any information contained therein;

(b) Utilizing any Weddington customer lists or any information contained therein;

(c) ~~Soliciting, contacting, or otherwise communicating with any customer of Weddington;~~

(d) ~~Providing sound production services to any customer of Weddington.~~ [(c) and (d) deleted by judge]

2. Defendants Flick, Creative Cafe, Beville, and each of them, and their agents, servants, employees and representatives are required to deliver to Weddingtoin within five days from the date hereof:

(a) All copies of the Library in their possession or under their control;

(b) All Weddington customer lists in their possession or under their control;

(c) All Weddington trade secrets in their possession or under their control;

3. The amount of the preliminary injunction bond to be ~~posted~~ filed in Dept. 58 by Weddington shall be $ 25,000 . [edited by judge]

DATED: JAN 20, 1996

/s/ ROBERT H. O'BRIEN
ROBERT H. O'BRIEN
Judge of the Superior Court

EXHIBIT 1

For purposes of this Preliminary Injunction, the Sound Effects Library of Weddington ("the Library") include the following:

(a) The digital master tape and other media (collectively "the Master Tape") on which the Library is stored;

(b) The computer data base including the relational data base program and attendant data files that are used for searching, cataloging and organizing the sound effects;

(c) The computer catalog collection of master audio recordings;

(d) The physical media on which the master sounds are recorded and stored consisting primarily of digital audio tape ("DAT");

(e) All versions of the current sound recording media including DAT, 1/4" reel to reel tape, 35mm magnetic rolls, 8mm exabite tape, 2" 24 track analog tape, cassette tape, and all other forms of sound recording media;

(f) All copies of each of the foregoing;

(g) All storage cabinets for each of the foregoing.

APPENDIX E

COPYRIGHT ACT OF 1976

17 U.S.C.

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;

(2) musical works, including any accompanying words;

(3) dramatic works, including any accompanying music;

(4) pantomimes and choreographic works;

(5) pictorial, graphic, and sculptural works;

(6) motion pictures and other audiovisual works;

(7) sound recordings; and

(8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

§ 202. Ownership of copyright as distinct from ownership of material object

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

§ 301. Preemption with respect to other laws

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any States.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to —

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978;

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106; or

(4) State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected under section 102(a)(8).

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause

of action arising from undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2047.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

(e) The scope of Federal preemption under this section is not affected by the adherence of the United States to the Berne Convention or the satisfaction of obligations of the United States thereunder.

(f)(1) On or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, all legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art to which the rights conferred by section 106A apply are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.

(2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to —

(A) any cause of action from undertakings commenced before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990:

(B) activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A with respect to works of visual art; or

(C) activities violating legal or equitable rights which extend beyond the life of the author.

Supreme Court, U.S.
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JUN 5 1997
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No. 96-1772

In The

Supreme Court of the United States

October Term, 1996

STEPHEN FLICK,

Petitioner,

v.

WEDDINGTON PRODUCTIONS, INC.,
a California corporation,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal Second Appellate District, Division 2

BRIEF OF RESPONDENT IN OPPOSITION

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PETITIONER'S QUESTIONS PRESENTED

1. Does the Copyright Act, 17 U.S.C. § 301, preempt a state court's subject matter jurisdiction to preliminarily enjoin and punish, as a contempt of court, in the course of adjudicating state law property rights, the reproduction of copyrightable subject matter (here, sound effects used in the motion picture "Twister")?

2. What is the legal standard under the preemption provision of the Copyright Act, 17 U.S.C. § 301, to be used in determining whether section 301 deprives a state court of subject matter jurisdiction?

OBJECTIONS TO QUESTIONS PRESENTED

United States Supreme Court Rule 15.2 commands parties opposing a petition for writ of certiorari to address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. As set forth herein, Petitioner's questions presented are misstatements of fact and law in their entirety with respect to this case, which does not implicate or otherwise involve the Copyright Act in any manner.

This case is a garden variety state law business tort case that was prosecuted *and defended* without reference to copyright law. Throughout this case, Petitioner consistently failed to raise during the contempt proceedings or at any other time prior to the conclusion of the contempt proceedings the copyright issues that he now asserts. Not until after Petitioner realized that he would be held in contempt of court did he raise the copyright issue.

Therefore, (i) the Copyright Act has no application to this case, and (ii) whether a conflict exists in the circuits regarding the applicable legal standard under the preemption provision of the Copyright Act is irrelevant. For these reasons, among others, the Petition for Writ of Certiorari must be denied.

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BRIEF IN OPPOSITION

Respondent Weddington Productions, Inc. respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Petitioner Stephen Flick.

STATEMENT OF THE CASE

On December 13, 1995, Respondent Weddington Productions, Inc. ("Respondent") filed a complaint (R. App. 1)[1] ("Respondent's Complaint") against, among others, Petitioner Stephen Flick ("Petitioner") in the Los Angeles Superior Court alleging, among other things, breach of fiduciary duty, claim and delivery, conversion, misappropriation of trade secrets, unfair competition, and related state law causes of action for Petitioner's theft and illegal use of the library of sound effects that is Respondent's most valuable asset (the "Sound Library").[2] In Respondent's Complaint, Respondent did not allege or implicate the Copyright Act. The gravamen of Respondent's Complaint is that Petitioner stole from Respondent a copy of the Sound Library and utilized it in violation of state law. On January 9, 1996, Petitioner filed his Answer (R. App. 2) to Respondent's Complaint, and did not raise any Copyright Act defenses or issues.

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[1] Citations to "P.App." are to the Appendix to the Petition for Certiorari. Citations to "R. App." are to the Appendix to this Brief of Respondents in Opposition.

[2] Respondent is a California corporation that provides sound effects editing services on motion pictures, television programs, television commercials and the like. Petitioner is a former shareholder and officer of Respondent.

At the same time that Respondent filed the Respondent's Complaint, Respondent filed a motion for a preliminary injunction to enjoin, among others, Petitioner, from utilizing the Sound Library (the "Injunction Motion"). In its moving papers (R. App. 3), Respondent asserted California law as the authority for the Injunction Motion. Petitioner's opposition (R. App. 4) to the Injunction Motion did not allege, let alone mention, the Copyright Act. Respondent filed a reply (R. App. 5) on January 25, 1996.

On January 29, 1996, in response to the Injunction Motion, Judge Robert H. O'Brien of the Los Angeles Superior Court entered a preliminary injunction (the "Injunction") in favor of Respondent and against, among others, Petitioner, which, among other things, precludes Petitioner from utilizing the Sound Library (P.App. D). Petitioner filed a notice of appeal of the issuance of the Injunction (the "Injunction Appeal") on February 2, 1996, appealing the issuance of the Injunction to the California Court of Appeal, Second Appellate District, Division 2 (the "California Appellate Court") (R. App. 6). The Injunction Appeal is pending, but Petitioner has not filed his opening brief.

On February 28, 1996, Petitioner filed a complaint (R. App. 7) ("Petitioner's Complaint") against, among others, Respondent, also alleging state law causes of action against Respondent with respect to the Sound Library, without mentioning or alleging the applicability of the Copyright Act. In fact, consistent with Petitioner's prosecution of Petitioner's Complaint and defense of Respondent's Complaint, Petitioner contended that state law,

and not the Copyright Act, governs the rights between the parties (R. App. 7).

On at least March 24 and 28, 1996, Petitioner willfully violated the Injunction by utilizing the Sound Library on the motion picture *Twister*. On May 14, 1996, Respondent filed an ex parte application for, among other things, issuance of an OSC re Contempt for Petitioner's willful violation of the Injunction (the "OSC Application") (R. App. 8). Petitioner filed an opposition (R. App. 9) in which he again did not raise the Copyright Act. On May 14, 1996, in response to the OSC Application, the trial court issued an OSC Re Contempt, and set a contempt trial for June 12, 1996. The contempt trial took place on June 12 and 13, 1996. Not until after the contempt trial, when the trial court indicated that it could hold Petitioner in contempt even if the parties settled their disputes, did Petitioner raise his frivolous Copyright Act argument.

By orders dated November 26, 1996, the trial court held Petitioner in contempt of the Injunction (P.App. A). On December 23, 1996, as punishment for willfully violating and disobeying the Injunction, the trial court fined Petitioner $16,000 ($1,000 per contempt violation with a total of 16 contempt violations) (the "Fine"), and ordered Petitioner to pay the Fine no later than December 30, 1996. The trial court imposed no jail time. Other than the $16,000 fine, no other punishment was imposed upon Petitioner. Petitioner paid the fine. Petitioner was ordered to pay Respondent $15,000 in attorneys' fees.

On December 23, 1996, after the sentencing, Petitioner filed with the California Appellate Court that certain Petition for Writ of Habeas Corpus, Mandate, Prohibition, Certiorari and/or Other Appropriate Relief

(the "Appellate Court Petition"), appealing the Fine. By order dated January 3, 1997, the California Appellate Court denied the Appellate Court Petition (P.App. B). Petitioner then filed a petition for writ of certiorari (the "California Certiorari Petition") with the California Supreme Court. By order dated February 5, 1997, the California Supreme Court denied the California Certiorari Petition (P.App. C).

As noted above, on February 2, 1996, Petitioner appealed the issuance of the Injunction, independent of the contempt proceeding. On January 13, 1997, Petitioner wrote a letter (R. App. 10) to the California Appellate Court which, among other things, (i) requested an extension of time with respect to the briefing schedule for the Injunction Appeal, and (ii) informed the California Appellate Court that, according to Petitioner, a number of issues raised in the Injunction Appeal are already the subject matter of writ proceedings, i.e., the Petition for Writ of Certiorari pending in this Court. By order dated February 28, 1997 (R. App. 11), the California Appellate Court extended until May 12, 1997 the date by which Petitioner must file its opening brief with respect to the Injunction Appeal.

On May 6, 1997, Petitioner filed a motion to extend the time within which Petitioner must file his opening brief on the Injunction Appeal. To this date, Petitioner has not filed his opening brief and the California Appellate Court has not ruled upon Petitioner's motion. On May 5, 1997, Petitioner filed the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

This Court must deny the Petition for Writ of Certiorari because (i) the Court does not have jurisdiction under 28 U.S.C § 1257(a) because this case does not implicate or otherwise involve the Copyright Act, the only federal question Petitioner asserts as a basis for the jurisdiction of this Court, (ii) the Court does not have jurisdiction under 28 U.S.C. § 1257(a) as there has been no final judgment rendered by the California Appellate Court or the California Supreme Court on the issues raised in the Questions Presented set forth in the Petition for Writ of Certiorari, and (iii) the Court should not exercise its discretion under United States Supreme Court Rule 10 to hear this case because, even if the alleged federal questions presented in the Petition for Writ of Certiorari are important and/or conflict with decisions of other state courts or this Court, the California Supreme Court has not decided such issues.

With respect to (i), this case is not a copyright case, and involves only state tort law, rendering irrelevant to this litigation what standards should be applied in determining when a state court's subject matter jurisdiction is preempted by the Copyright Act, and whether a conflict among the circuits as to such standard exists.

With respect to (ii) and (iii), of the two Questions Presented, only the first attempts to implicate the facts of this case.[3] In the first Question Presented, Petitioner asks,

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[3] As set forth below, since the first Question Presented is not ripe for adjudication, the Court may not address the second Question Presented by itself because to do so would require the

among other things, whether the state trial court had subject matter jurisdiction to *preliminarily enjoin* and punish, as a contempt of court, in the course of adjudicating state law property rights, the reproduction of copyrightable subject matter (emphasis added).[4] According to Petitioner, whether the state trial court had subject matter jurisdiction to "preliminarily enjoin" Petitioner by issuing the Injunction depends upon whether the state trial court was preempted from issuing the Injunction, the same issue that Petitioner has not yet presented to the California Appellate Court or the California Supreme Court, and the same issue that Petitioner presumably will attempt to present to the California Appellate Court in the Injunction Appeal.

Court to render an advisory opinion because, absent the dispute in this case, there is no justiciable case or controversy. *United Food and Commercial Workers v. Brown Group*, ___ U.S. ___, 116 S.Ct. 1529, 1533, 134 L. Ed. 2d 758 (1996). Moreover, as set forth below, the second Question Presented is subsumed within the first.

[4] In accordance with United States Supreme Court Rule 15.2, Petitioner's statement in the first Question Presented that the subject matter in question is "copyrightable" is argumentative, and Respondent asserts that the subject matter in question may not be copyrightable. In the event that the Court grants the Petition for Writ of Certiorari, Respondent reserves the right to argue, among other things, that the subject matter in question is not copyrightable. Further, Respondent also contends that the statement that "Petitioner was enjoined from, and held in contempt for, reproducing the subject matter in question" may be a misstatement of fact as well, as even though the Injunction enjoined Petitioner from *utilizing* or reproducing the subject matter in question, Petitioner was held in contempt for utilizing (not reproducing) the subject matter in question.

If the state trial court had subject matter jurisdiction to issue the Injunction, it had subject matter jurisdiction to hold Petitioner in contempt for violating the Injunction. If the state trial court did not have subject matter jurisdiction to issue the Injunction, it did not have subject matter jurisdiction to hold Petitioner in contempt for violating the Injunction. In either case, a reviewing court must determine whether the state trial court had subject matter jurisdiction to issue the Injunction. Since neither the California Appellate Court nor the California Supreme Court has addressed this issue in this case, and since the California Appellate Court may address this issue,[5] this Court does not have jurisdiction to hear this case, and must deny the Petition for Writ of Certiorari.

A. THE COURT DOES NOT HAVE JURISDICTION UNDER 28 U.S.C. § 1257(a) OR SUPREME COURT RULE 10 TO HEAR THIS CASE BECAUSE IT IS NOT A COPYRIGHT CASE AND NO FEDERAL QUESTION IS INVOLVED.

28 U.S.C. § 1257(a) provides that Supreme Court appellate jurisdiction exists to review a decision "where any . . . right . . . is . . . claimed under the . . . statutes

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[5] As set forth below, the California Appellate Court may refuse to entertain the issue in the first place on one of a number of theories. If that were to happen, this Court still would not have jurisdiction because Petitioner would not have taken all steps necessary to exhaust his state court remedies. *Beck v. Washington*, 369 U.S. 541, 549, 82 S.Ct. 955, 8 L. Ed. 2d 98 (1962), *reh'g denied*, 370 U.S. 965, 82 S.Ct. 1575, 8 L. Ed. 2d 834 (1962); *Gorman v. Washington University*, 316 U.S. 98, 100-101, 62 S.Ct. 962, 86 L. Ed. 1300 (1942).

of . . . the United States." Supreme Court Rules 10(b) and (c) provide that the Supreme Court may exercise its discretion to grant a petition for writ of certiorari when a state court has decided "an important federal question" or "an important question of federal law." Here, Petitioner asserts that the Copyright Act applies to this case. Petitioner not only is incorrect, but argued consistently throughout the course of this litigation until he knew that he would be held in contempt of court that the Copyright Act has no application whatsoever.

1. This Case Is Not Within The Exclusive Jurisdiction Of The United States District Court Because It Is Not A Copyright Case.

Irrespective of whether the Sound Library is even copyrightable material (if it is not, the Copyright Act certainly does not apply),[6] the Copyright Act has no application to this case, and did not place the exclusive jurisdiction of this case in the United States District Court. Among other things, Respondent, in this action, has not alleged copyright infringement, nor has it alleged claims under California law that are the functional equivalent of copyright infringement. Rather, the entire basis of

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[6] Copyright protection applies only to certain works of authorship. Petitioner has argued that the Sound Library is a "sound recording" or "audio-visual work" pursuant to § 101 of the Copyright Act. The term "sound recordings" specifically excludes "sounds accompanying a motion picture or other audio-visual work." The term "audio-visual work" includes both the movie and the accompanying sounds. Therefore, the Sound Library is not an audio-visual work, and might not be a sound recording.

this action and the Injunction is that Petitioner breached his fiduciary duties to Respondent, misappropriated trade secrets of Respondent and converted property belonging to Respondent by stealing from Respondent specific business property, i.e., the Sound Library.[7]

The *substance* of Respondent's claim is that Petitioner violated state law by stealing the Sound Library and using it in the motion picture *Twister*. Respondent is not contending that Petitioner reproduced the Sound Library for sale, performed the Sound Library, distributed the Sound Library or displayed the Sound Library, in violation of the Copyright Act.

The Sound Library is a trade secret of Respondent. Irrespective of what the specific property is, and whether or not such property is copyrightable, Petitioner committed a tort, i.e., breach of fiduciary duties owed to Respondent by nature of Petitioner's relationship to Respondent, by stealing and exploiting for himself the Sound Library, to the detriment of Respondent. Just because corporate property that is misappropriated may be copyrightable is not grounds for exclusive jurisdiction. Where, as here, copyright infringement is not asserted, exclusive federal jurisdiction does not exist. *See, e.g., McCord v. Broadcast*

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[7] Whether the Sound Library (the sounds therein and the physical media upon which they are stored) is copyrightable subject matter is irrelevant. Respondent has alleged and proved that Petitioner stole from Respondent a copy of the Sound Library. That Petitioner, a shareholder and former officer and director of Respondent, stole Respondent's property is the relevant fact. Whether the property stolen is copyrightable or not does not matter to this action because Respondent has not alleged copyright infringement or a state law equivalent.

Music, Inc., 89 N.Y.S. 2d 772 (Sup. Ct. N.Y. County 1949); *Underhill v. Schenck*, 238 N.Y. 7, 13, 143 N.E. 773, 775 (1924) (state court has jurisdiction, and federal court does not have exclusive jurisdiction, in action involving a copyrighted play where plaintiff complains of "breach of a duty attaching by implication of law to a fiduciary relation which has its origin in contract").[8] In this case, Respondent alleged and proved that irrespective of whether the Sound Library is a copyrighted or copyrightable work, Petitioner breached fiduciary duties to Respondent that arose as a result of Petitioner's status as a shareholder, director and officer of Respondent. As such, Petitioner had express duties to Respondent which were contractual in nature.

Under controlling copyright law, an action arises under federal copyright laws for purposes of federal subject matter jurisdiction if and only if "the complaint is for a remedy expressly granted by the Copyright Act, asserts a claim requiring construction of the Act, or at the very least presents a case in which a distinctive policy of the Act requires that federal principles control disposition of the claim." *Rano v. Sipa Press, Inc.*, 987 F. 2d 580 (9th Cir. 1983). Petitioner has made no argument and presented no evidence that some distinctive policy of the Act requires that federal principles control disposition of

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[8] 28 U.S.C. § 1338 is the statue that provides exclusive jurisdiction in federal court for copyright cases. At the time these two cases were decided, 1949 and 1924, either § 1338 or an equivalent was in effect, as a predecessor to § 1338 was passed in 1911 and § 1338 was passed in 1948.

this action. For the reasons set forth above, no such policy exists.

Further, as noted above, this action is for Breach of Fiduciary Duty, Conversion, Misappropriation of Trade Secrets and other state law tort claims. The Injunction was based upon Petitioner's breach of fiduciary duties to Respondent. Respondent established that Petitioner stole trade secrets and other property of Respondent, including the Sound Library, from Respondent, and used such property to compete with Respondent. This action and the Injunction have nothing to do with the federal copyright law, and do not require that copyright laws be interpreted.

Under controlling law, a plaintiff such as Respondent is entitled to determine what claims it wishes to assert in an action, and as the "master of its claims" is entitled to rely on state law causes of action only, without implicating the federal copyright laws. *See 3 Nimmer on Copyright*, Jurisdiction and Venue, § 12.01[A][1][d], pp. 12-15. Further, where, as here, Respondent's Complaint does not seek remedies under or equivalent to the Copyright Act, even if the defendant asserts a federal defense under the copyright laws, federal jurisdiction does not exist. *See, e.g., Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10 (1983). Thus, this action clearly is not a federal copyright case, and the state courts have subject matter jurisdiction.[9]

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[9] Significantly, raising this issue as a defense now is beyond the scope of the pleadings, and not proper, as Petitioner's answer contains no copyright defense whatsoever, let alone any reference to the federal copyright laws.

2. Not Only Did Petitioner Fail To Raise The Copyright Claim During The Contempt Proceeding, But Petitioner Consistently Argued That This Action Is Not A Copyright Case.

On at least two separate occasions, Petitioner had the opportunity (and the duty, if a meritorious claim existed) to raise his federal copyright law issue, first at the hearing on the Injunction, and second at the contempt trial. Petitioner had two separate proceedings to present evidence supporting his federal copyright law claim and assert his federal copyright claim, and failed to do so. Petitioner did not raise the Copyright Act because he knew that the Copyright Act had no application to this case.

In fact, when Petitioner filed a retaliatory lawsuit against Respondent (R. App. 7), Petitioner asserted his ownership interest in the Sound Library, and Respondent's alleged violation of state law in utilizing the Sound Library. Petitioner did not mention the Copyright Act, or otherwise plead its applicability, thereby admitting that this is not a federal copyright case. Not until Petitioner realized that he was going to be held in contempt did he raise the frivolous Copyright Act issue.

3. If Petitioner Truly Believed This To Be A Federal Copyright Case, He Should Have Timely Removed The Case to Federal Court, And His Failure To Do So Constitutes A Waiver

Pursuant to 28 United States Code § 1441(a), any civil action brought in a state court of which the district courts of the United States have original jurisdiction may be

removed by the defendant. Thus, to place this action in federal court, if to do so were proper, would require Petitioner to remove the action to federal court.

Pursuant to 28 United States Code § 1446(b), a defendant must remove a case from state court to federal court within 30 days after the service of summons upon the defendant. If the defendant does not timely file a notice of removal, i.e., within 30 days, the case may not be removed. In this case, Petitioner failed to timely file a notice of removal, not only rendering the case not removable, but evidencing Petitioner's true belief that this is not a federal copyright action, and since Respondent and Petitioner are citizens of California, no basis for federal jurisdiction exists.[10]

B. THE COURT DOES NOT HAVE JURISDICTION UNDER 28 U.S.C. § 1257(a) TO HEAR QUESTION PRESENTED NO. 1 BECAUSE THE CALIFORNIA SUPREME COURT HAS NOT RENDERED A FINAL JUDGMENT ON THE ISSUE.

28 U.S.C. § 1257(a) provides in relevant part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any

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[10] As set forth above, this case clearly is not a copyright case subject to the jurisdiction of the United States district court. Even if it were, however, federal law would require that a petition for removal be timely filed. 3 *Nimmer on Copyright*, Jurisdiction and Venue, § 12.01[A][1][d], pp. 12-15; 28 United States Code § 1441(e).

> . . . right . . . is . . . claimed under the . . . statutes of . . . the United States.

Supreme Court review may not be sought until all available remedies under state procedure have been exhausted. *Gorman v. Washington University*, 316 U.S. 98, 100-101, 62 S.Ct. 962, 86 L. Ed. 1300 (1942).

In the first Question Presented, Petitioner actually presents two questions whose resolution depends upon the same legal issue and analysis. The first is whether the state trial court had jurisdiction to preliminarily enjoin Petitioner, and the second is whether the state trial court had jurisdiction to punish Petitioner for contempt. The first of these questions, whether the state trial court had subject matter jurisdiction to preliminarily enjoin Petitioner from utilizing the Sound Library, is precisely the issue that Petitioner has appealed to the California Appellate Court, and which is currently pending by way of the Injunction Appeal (R. App. 6 and 10). First, in Petitioner's Notice of Appeal to the California Appellate Court, Petitioner indicates that he is appealing "from the granting of Plaintiff's motion for a preliminary injunction." This is the same preliminary injunction referenced in the first Question Presented. Moreover, in his letter to the California Appellate Court (R. App. 10), Petitioner admits that the issues raised in the Injunction Appeal pending before the California Appellate Court are the same issues raised in the "Writ Proceedings," which are the proceedings that led to this Petition for Writ of Certiorari.

Thus, not only has the California Appellate Court (and also the California Supreme Court) not yet ruled on

whether the state trial court had subject matter jurisdiction to preliminarily enjoin Petitioner, but that precise issue is currently pending before the California Appellate Court. Therefore, it is clear that the highest court of the State of California has not yet rendered a final judgment as to whether the state trial court had subject matter jurisdiction to preliminarily enjoin Petitioner.[11]

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[11] As noted in the Statement of the Case, *supra*, Petitioner was supposed to have filed his opening brief by May 12, 1997. While he filed a motion for an extension of time, the California Appellate Court has not ruled on that motion. Petitioner has not yet filed his opening brief. A dismissal of the Injunction Appeal for Petitioner's failure to file his opening brief in a timely fashion would not mean that Petitioner exhausted his state court appellate remedies, precluding him from obtaining review in this Court. *Beck v. Washington*, 369 U.S. 541, 549, 82 S.Ct. 955, 8 L. Ed. 2d 98 (1962), *reh'g denied*, 370 U.S. 965, 82 S.Ct. 1575, 8 L. Ed. 2d 834 (1962) (those who fail to comply with state court rules cannot seek Court's review). In essence, if the Injunction Appeal is dismissed because Petitioner did not timely file his opening appellate brief, he will be precluded from seeking review from this Court because he did not comply with state court rules. *See, also Gorman*, 316 U.S. at 100-101 (Court may not review state case until possibilities afforded by state procedure for its review by all state tribunals have been exhausted). Moreover, Respondent will argue in its appellate brief to the California Appellate Court, if the Injunction Appeal is not dismissed, that the California Appellate Court should not consider the jurisdiction issue because Petitioner did not make the jurisdictional argument to the state trial court in a timely fashion, and therefore has waived his right to make the argument on appeal. Further, Respondent will argue to the California Appellate Court that the California Appellate Court already concluded, when it denied the Appellate Court Petition, and that the California Supreme Court already concluded, when it denied the California Certiorari Petition, that the state trial court had jurisdiction to punish Petitioner for violating the

With respect to whether the state trial court had jurisdiction to hold Petitioner in contempt of court for violating the Injunction, a contempt order is not appealable in the California court system and is only subject to review by way of a state petition for writ of certiorari. California Code of Civil Procedure § 904.1(a), § 1222; *Imuta v. Nakano*, 233 Cal.App.3d 1570, 1584 n. 18, 285 Cal.Rptr. 681, 690 n. 18 (1991). Further, the only reviewable issue with respect to the contempt order is whether the state trial court had jurisdiction to hold Petitioner in contempt for violating the Injunction. *Green v. Superior Court of San Joaquin County*, 220 Cal.App.2d 121, 33 Cal.Rptr. 604 (1963).

The analysis and resolution of this issue is exactly the same as the analysis and resolution of whether the state trial court had jurisdiction to issue the Injunction in the first place. Since that issue has not been finally decided by the California Appellate Court or the California Supreme Court, this Court does not have jurisdiction under 28 U.S.C. § 1257(a) to grant the Petition for Writ of Certiorari.[12]

Injunction. Nonetheless, the California Appellate Court may be willing to consider or reconsider the jurisdictional argument over the objections of Respondent.

[12] Moreover, Petitioner has framed the first Question Presented as one issue, i.e., whether the state trial court had jurisdiction to issue the Injunction and hold Petitioner in contempt for violating the Injunction. Since this Court does not have jurisdiction to decide whether the state trial court had jurisdiction to issue the Injunction, it does not have jurisdiction to address the first Question Presented.

C. UNDER SUPREME COURT RULE 10, THIS COURT DOES NOT HAVE DISCRETION TO GRANT THE PETITION FOR WRIT OF CERTIORARI.

With respect to lower decisions issued by state courts (as opposed to lower federal courts), United States Supreme Court Rule 10 provides that the Court should be more likely to grant a petition for writ of certiorari when important federal questions or important questions of federal law that conflict with other state court decisions, United States Courts of Appeal decisions, or United States Supreme Court decisions *have been decided by a state court of last resort*. As set forth above, the California Supreme Court has not decided the first Question Presented. Moreover, neither the state trial court, the California Appellate Court nor the California Supreme Court decided the second Question Presented, i.e., the legal standard under the Copyright Act to be used in determining whether the Copyright Act deprives a state court of subject matter jurisdiction. Since no final decision has been rendered, this Court should not exercise its discretion, and should deny the Petition for Writ of Certiorari.

D. NOT ONLY IS THERE NO CASE OR CONTROVERSY WITH RESPECT TO THE SECOND QUESTION PRESENTED, BUT THE SECOND QUESTION PRESENTED IS SUBSUMED WITHIN THE FIRST QUESTION PRESENTED.

Petitioner has framed the second Question Presented as:

> What is the legal standard under the preemption provision of the Copyright Act, 17 U.S.C. § 301,

to be used in determining whether section 301 deprives a state court of subject matter jurisdiction?

For the reasons set forth above, this Court does not have jurisdiction to entertain the first Question Presented. Left with only the second Question Presented, the Court is asked to determine a legal standard without any application whatsoever to facts. To entertain a case, this Court must be convinced that an actual case or controversy between adverse parties exists that will be resolved by a decision from the Court. This Court has federal judicial power under Article III of the Constitution only if, among other things, there is a likelihood that any alleged injury suffered by Petitioner will be redressed by a favorable decision. *United Food and Commercial Workers v. Brown Group*, ___ U.S. ___, 116 S.Ct. 1529, 1533, 134 L. Ed. 2d 758 (1996). If the Court were to address the second Question Presented and determine what legal standard should apply in determining when the Copyright Act preempts state court subject matter jurisdiction, such a determination would not redress or otherwise resolve Petitioner's alleged injury, given that the first Question Presented was not addressed by the California Supreme Court. An opinion addressing only the second Question Presented would constitute an advisory opinion because determining a legal standard without application to a controversy between Petitioner and Respondent would not resolve the dispute between them.

Moreover, the second Question Presented is subsumed within the first Question Presented. In determining whether the state trial court had jurisdiction to issue the Injunction and punish Petitioner for violating the

Injunction, the Court necessarily would have to know what legal standard to apply to answer the question. Therefore, the second Question Presented is actually part of the first Question Presented. Since the Court does not have jurisdiction to hear the first Question Presented at this time, it does not have jurisdiction to hear the second Question Presented at this time and must deny the Petition.

CONCLUSION

This case is not a copyright case. Petitioner belatedly attempted to manufacture a federal question under the Copyright Act where none exists in a futile attempt to deprive the state court of jurisdiction when Petitioner realized the state court would shortly hold Petitioner in contempt. Further, neither the California Appellate Court nor the California Supreme Court has rendered a final judgment on the Questions Presented in Petitioner's Petition for Writ of Certiorari. Given the pendency of Petitioner's Injunction Appeal, a final judgment from the California court system as to whether the state trial court had jurisdiction to preliminarily enjoin and punish Petitioner for violating the Injunction will not be rendered until the California Appellate Court disposes of the Injunction Appeal, and, if either party thereafter appeals to the California Supreme Court, not until the California

Supreme Court disposes of that appeal. Therefore, this Court should deny the Petition for Writ of Certiorari.

DATED: June 5, 1997

Respectfully submitted,

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R. APP. 1

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

(Filed Dec. 13, 1995)

WEDDINGTON PRODUCTIONS, INC., a California Corporation, Plaintiff, v. STEPHEN FLICK, an individual, STEVE FLICK'S CREATIVE CAFE, a purported corporation, DEAN BEVILLE, an individual; and DOES 1 through 75, Inclusive, Defendants.	CASE NO. BC140705 VERIFIED COMPLAINT FOR: 1. DAMAGES FOR BREACH OF FIDUCIARY DUTY; 2. CLAIM AND DELIVERY; 3. CONVERSION; 4. INJUNCTION TO RESTRAIN, AND DAMAGES FOR MISAPPROPRIATION OF TRADE SECRETS; 5. INJUNCTION TO RESTRAIN, AND DAMAGES FOR UNFAIR COMPETITION; 6. INJUNCTION TO RESTRAIN, AND DAMAGES FOR CONSPIRACY TO UNFAIRLY COMPETE;

7. DAMAGES FOR WRONGFUL INTERFERENCE WITH THE PROSPECTIVE ECONOMIC RELATIONSHIP;
8. DAMAGES FOR CONSPIRACY TO WRONGFULLY INTERFERE WITH THE PROSPECTIVE ECONOMIC RELATIONSHIP;
9. ACCOUNTING;
10. MONEY HAD AND RECEIVED;
11. MONEY LENT;
12. OPEN BOOK ACCOUNT

Plaintiff Weddington Productions, Inc., a California corporation ("Weddington"), alleges as follows:

PRELIMINARY ALLEGATIONS

1. Weddington is now, and at all times material hereto has been, a corporation organized and existing under and by virtue of the laws of the State of California with its principal place of business in the County of Los Angeles, State of California.

2. Defendant Stephen Flick ("Flick") is now, and at all times material hereto has been, an individual residing within the County of Los Angeles, California.

3. The true names and capacities, whether individual, corporate, associate, or otherwise, of the Defendants

named herein as Does 1 through 50, inclusive, are unknown to Weddington, who therefore sues said Defendants by such fictitious names. Weddington will amend this Complaint to show their true names and capacities when the same have been ascertained.

4. The true names and capacities, whether individual, corporate, associate or otherwise, of the Defendants named herein as Does 51 through 75, inclusive, are unknown to Weddington, who therefore sues said Defendants by such fictitious names. Weddington will amend this Complaint to show their true names and capacities when the same have been ascertained. Weddington is informed and believes, and based upon such information and belief alleges, that Does 51 through 75, inclusive, are now, and at all times material hereto have been, customers of Flick and Steve Flick's Creative Cafe.

5. Defendant Dean Beville ("Beville") is now, and at all times material hereto has been, an individual residing within the County of Los Angeles, California.

6. Weddington is informed and believes, and on the basis of such information and belief alleges, that Steve Flick's Creative Cafe ("Creative Cafe"):

(a) Purports to be a corporation organized and existing under and by virtue of the laws of the State of California;

(b) Is doing business in the County of Los Angeles, California;

(c) Was formed by Flick on or about July 13, 1995; and

(d) Is owned and controlled by Flick.

7. Weddington is informed and believes, and on the basis of such information and belief alleges, that at all times material hereto, each Defendant was the agent and employee of each other Defendant, and in doing the things hereinafter alleged, acted within the scope and course of such agency and employment.

8. Weddington is now, and at all times material hereto has been, a production company engaged in the business of providing sound editing and sound effects services for, among other things, feature length motion pictures, movies made for television, television programs, and other entertainment programs ("Sound Production").

9. Flick is now, and at all times material hereto has been:

(a) A shareholder of Weddington, and the owner of 1/3 of the outstanding stock of Weddington;

(b) A member of the Board of Directors of Weddington; and

(c) An officer (and most recently since May, 1995 President) of Weddington.

10. Weddington is now, and at all times material hereto has been, the owner of a sound effects library and computer data base (collectively the "Library") consisting of sound effects created by Weddington, its shareholders, officers, and employees prior to the filing of this lawsuit. The Library is stored on a digital master tape and other media (collectively, the "Master Tape"), and various copies of the Master Tape have been made by Weddington. Weddington holds all right, title and interest in and to the Library, the Master Tape, and each copy

thereof. The Library constitutes a proprietary trade secret owned by Weddington.

FIRST CAUSE OF ACTION

(Breach of Fiduciary Duty Against Flick and Does 1 Through 50)

11. Weddington repeats and realleges each and every allegation set forth in paragraphs 1 through 3, inclusive, and 7 through 10, inclusive, of this Complaint and the same are incorporated herein by reference as though set forth in full herein.

12. By reason of the foregoing, Defendants now owe, and at all times material hereto have owed, fiduciary duties to Weddington.

13. On or about October 13, 1995, without the prior knowledge, consent or approval of Weddington or its Board, Defendants wrote a check payable to Flick, in the amount of $129,605 (the "Fraudulent Check") drawn against a Weddington bank account. Thereafter, Defendants negotiated the Fraudulent Check, and in so doing, received proceeds that belonged to Weddington in the amount of $129,605 (the "Stolen Proceeds").

14. Weddington is informed and believes, and based upon such information and belief alleges, that:

(a) Defendants are engaged in the Sound Production business; and

(b) From and after July 1995, Defendants have competed with Weddington in the Sound Production business.

15. Weddington is informed and believes, and based upon such information and belief alleges, that:

(a) Defendants have, in their possession, one or more copies of the Library; and

(b) Defendants are using the copies of the Library in their possession to compete with Weddington in the Sound Production business.

16. In doing the acts and things herein above alleged, Defendants have breached the fiduciary duties they owe to Weddington.

17. By reason of Defendants' breach of fiduciary duties as aforesaid, Weddington has been damaged in an amount as yet unascertained but in no event less that [sic] the sum of $500,000 together with interest thereon at the highest legal rate. Weddington will seek leave of Court to amend this Complaint to set forth the amount of said damages when the same have been ascertained.

18. In doing the acts and things herein above alleged, Defendants were guilty of malice and oppression, and as a result, Weddington is entitled to punitive damages from Defendants in an amount according to proof at the time of trial.

SECOND CAUSE OF ACTION

(Claim and Delivery Against Flick and Does 1 Through 50, Inclusive)

19. Weddington repeats and realleges each and every allegation set forth in paragraphs 1 through 3, inclusive, and 7 of this Complaint and the same are

incorporated herein by reference as though set forth in full herein.

20. On or about April 3, 1995, Weddington entered into a California Net (Closed End) Lease (the "Lease") with Hornburg Jaguar Inc. ("Hornburg") pursuant to which Weddington leased a 1995 Jaguar (the "Jaguar"). Weddington is informed and believes, and based upon such information and belief alleges, that Defendants are in possession of the Jaguar and that the Jaguar is located at 2959 South Glendale Blvd., Los Angeles, California 90039.

21. Weddington is now, and at all times material hereto has been, entitled to possession of the Jaguar, and obligated to Hornburg with respect to the Jaguar under the Lease. Weddington is obligated to make monthly lease payments to Hornburg under the Lease for a period of 24 months commencing on May 3, 1995 and continuing through and including April 3, 1997, in the amount of $699.

22. Weddington is informed and believes, and based upon such information and belief alleges, that Defendants have no equity interest in the Jaguar.

THIRD CAUSE OF ACTION

(Claim and Delivery Against Flick, Creative Cafe, Beville, and Does 1 Through 50, Inclusive)

23. Weddington repeats and realleges each and every allegation set forth in paragraphs 1 through 3, inclusive, 5 through 10, inclusive and 14 and 15 of this

Complaint, and the same are incorporated herein by reference as though set forth in full herein.

24. Weddington is informed and believes, and based upon such information and belief alleges, that the copies of the Library in the possession of Defendants are located at 2959 South Glendale Blvd., Los Angeles, California 90039.

25. Weddington is now, and at all times material has been, entitled to possession of all copies of the Library including but not limited to the copies of the Library in the possession of Defendants.

26. Weddington is informed and believes that the Library constitutes unique property with specific characteristics and attributes for which a value is not readily ascertainable but that the Library is of such a value that:

(a) Weddington could not be engaged in the Sound Production business without use of and access to the Library; and

(b) A company in the Sound Production business could successfully compete with Weddington by wrongfully using the Library which is proprietary to Weddington.

FOURTH CAUSE OF ACTION

(For Injunction Against Flick, Creative Cafe, and Does 1 Through 50, Inclusive)

27. Weddington repeats and realleges each and every allegation set forth in paragraphs 1 through 3,

inclusive, 6 through 10, inclusive and 13 of this Complaint, and the same are incorporated herein by reference as though set forth in full herein.

28. By reason of Defendants wrongful conduct as alleged herein, Weddington has sustained, and unless this Court issues a temporary restraining order, a preliminary injunction and permanent injunction, will continue to sustain great and irreparable injury in that among other things:

(a) The Fraudulent Check and Stolen Proceeds constituted substantially all of Weddington's working capital;

(b) By reason of the wrongful conduct of Defendants as alleged herein, substantially all of Weddington's working capital has been depleted; and

(c) Without the return of Weddington's working capital, Weddington's ability to conduct its business will be impaired.

29. Weddington has no adequate remedy at law for the injuries that Weddington will sustain by reason of the conduct of Defendants as alleged herein.

30. Weddington is entitled to a temporary restraining order, preliminary injunction, and permanent injunction, compelling Defendants to deliver to Weddington the Stolen Proceeds received by Defendants after they wrongfully issued and negotiated the Fraudulent Check.

FIFTH CAUSE OF ACTION

(For Injunction Against Flick, Creative Cafe, Beville and Does 1 Through 50, Inclusive)

31. Weddington repeats and realleges each and every allegation set forth in paragraphs 1 through 3, inclusive, 6 through 10, inclusive and paragraphs 14 through 16, inclusive, of this Complaint, and the same are incorporated herein by reference as though set forth in full herein.

32. By reason of Defendants' wrongful conduct as alleged herein, Weddington has sustained, and unless this Court issues a temporary restraining order, a preliminary injunction and permanent injunction, will continue to sustain, great and irreparable injury in that, among other things:

(a) The Library is proprietary to, and a trade secret of, Weddington;

(b) A Sound Production company that is engaged in the Sound Production business that has access to the Library will be able to compete with Weddington to the extent it has wrongfully gained access to the Library;

(c) Defendants are wrongfully using the Library to compete with Weddington, steal Weddington's clients, deprive Weddington of job opportunities, and divert revenue and profits that Weddington would otherwise receive to themselves to the detriment of Weddington; and

(d) Weddington's business will be impaired if Defendants are permitted to continue to wrongfully use

the copies of the Library in their possession for the foregoing purposes.

33. Weddington has no adequate remedy at law for the injuries that Weddington will sustain by reason of the conduct of Defendants as alleged herein.

34. By reason of the facts alleged herein, Weddington is entitled to a temporary restraining order, preliminary injunction, and permanent injunction:

(a) Compelling Defendants to deliver to Weddington all copies of the Library in their possession; and

(b) Precluding Defendants from soliciting or providing Sound Production services to all clients of Weddington.

SIXTH CAUSE OF ACTION

(For Conversion Against Flick and Does 1 Through 50, Inclusive)

35. Weddington repeats and realleges each and every allegation set forth in paragraphs 1 through 3, inclusive, 6 through 10, inclusive and 12, 13, 17 and 18 of this Complaint, and the same are incorporated herein by reference as though set forth in full herein.

36. Weddington is now, and at all times material hereto has been, entitled to possession of the Stolen Proceeds received by Defendants following the wrongful issuance and endorsement of the Fraudulent Check by Defendants.

37. In doing the acts and things herein above alleged, Defendants wrongfully converted the Fraudulent

Check and Stolen Proceeds to their own use and benefit, to the detriment of Weddington.

38. In addition to the other damages alleged herein, Weddington has expended, and will in the future, expend additional sums of money in pursuit of the property converted by Defendants as alleged herein, all to Weddington's damage in an amount as yet unascertained. Weddington will seek leave of Court at the time of trial to set forth the amount of said damages.

SEVENTH CAUSE OF ACTION

(For Conversion Against Flick, Creative Cafe, Beville, and Does 1 through 50, inclusive)

39. Weddington repeats and realleges each and every allegation set forth in paragraphs 1 through 3, inclusive, 5 through 10, inclusive, and 15, 17, 18 and 38 of this Complaint, and the same are incorporated herein by reference as though set forth in full herein.

40. Weddington is now, and at all times material hereto has been, entitled to possession of all copies of the Library, including but not limited to the copies of the Library in the possession of Defendants.

41. In doing the acts and things herein above alleged, Defendants have wrongfully converted the Library to their own use and benefit, to the detriment of Weddington.

EIGHTH CAUSE OF ACTION

(For Conversion Against Flick and Does 1 Through 50, Inclusive)

42. Weddington repeats and realleges each and all of the allegations set forth in paragraphs 1 through 3, inclusive, 7, 18, 20 through 22, inclusive, and 38 of this Complaint and the same are incorporated herein by reference as though set forth in full herein.

43. Weddington is now, and at all times material hereto has been, entitled to possession of the Jaguar.

44. In doing the acts and things hereinabove alleged, Defendants have wrongfully converted the Jaguar to their own use and benefit, to the detriment of Weddington.

NINTH CAUSE OF ACTION

(For An Injunction To Restrain, And Damages For, Unfair Competition Against All Defendants)

45. Weddington repeats and realleges each and all of the allegations set forth in paragraphs 1 through 10, inclusive, and 13 through 18, inclusive, of this Complaint, and the same are incorporated herein by reference as though set forth in full herein.

46. Commencing in August of 1995, and continuing to the present time, Defendants, and each of them, knowingly and willfully conspired and have engaged in unfair competition in violation of Business and Professions Code Section 17200.

TENTH CAUSE OF ACTION

(For An Injunction To Restrain, And Damages For, Violation of Uniform Trade Secrets Act Against All Defendants)

47. Weddington repeats and realleges each and every allegation set forth in paragraphs 1 through 10, inclusive and 13 through 18, inclusive, of this Complaint, and the same are incorporated herein by reference as though set forth in full herein.

48. In doing the acts and things herein alleged, Defendants are guilty of having misappropriated and misused trade secrets in violation of the Uniform Trade Secrets Act set forth in Section 3426-3426.10 of the California Civil Code. As a result thereof, and in addition to all other relief requested herein and available under the Uniform Trade Secrets Act, Weddington is entitled to recover attorneys' fees incurred in this action pursuant to Section 3426.4 of the California Civil Code.

ELEVENTH CAUSE OF ACTION

(For Wrongful Interference With Prospective Economic Advantage Against All Defendants)

49. Weddington repeats and realleges each and every allegation set forth in paragraphs 1 through 10, inclusive and 13 through 18, inclusive, of this Complaint, and the same are incorporated herein by reference as though set forth in full herein.

50. At all times material herein, Weddington has had advantageous economic relationships with its clients

and customers containing the probability of future economic benefit to Weddington (the "Advantageous Relationships").

51. In or about August 1995, and continuing to the present time, Defendants have had knowledge of the Advantageous Relationships, and have committed the foregoing tortious acts with the intent to disrupt them.

52. Defendants have successfully interfered with the Advantageous Relationships by soliciting the business of Weddington's clients and customers which otherwise would have gone to Weddington.

53. The interference with the Advantageous Relationships by Defendants has injured Weddington's business and goodwill, and Weddington is entitled to general damages in an amount not yet fully known to it but in no event less than the sum of $500,000. Weddington will seek leave of court to amend this Complaint to set forth the amount of said damages when the same have been ascertained.

54. Defendants have committed the foregoing tortious acts with the intention to cause injury to Weddington. By intentionally and tortiously causing Weddington damage, Defendants have also been guilty of oppression, fraud and/or malice, and therefore Weddington, pursuant to California Civil Code Section 3294 may recover punitive damages in an amount according to proof at the time of trial for the sake of example and by way of punishing Defendants.

TWELFTH CAUSE OF ACTION

(For Conspiracy To Wrongfully Interfere With A Prospective Economic Advantage Against All Defendants)

55. Weddington repeats and realleges each and every allegation set forth in paragraphs 1 through 10, inclusive, 13 through 18, inclusive, and paragraphs 50 through 52, inclusive, of this Complaint, and the same are incorporated herein by reference as though set forth in full herein.

56. In or about August 1995, and continuing until the present time, Defendants knowingly and willfully conspired to interfere with the Advantageous Relationships.

57. In furtherance of this conspiracy, Defendants committed the tortious acts alleged herein.

58. The conspiracy, and the acts in furtherance of it, caused injury to Weddington's business and goodwill, and Weddington is therefore entitled to general damages in an amount not yet fully known to it, but in no event less than $500,000. Weddington will seek leave of Court to amend this Complaint to set forth the amount of said damages when the same have been ascertained.

59. Defendants conspired, and acted in furtherance of the conspiracy, with the intention to cause injury to Weddington. By intentionally and tortiously causing Weddington damage, Defendants have been guilty of oppression, fraud and/or malice and therefore Weddington, pursuant to California Civil Code Section 3294, may recover punitive damages in an amount according to

proof at the time of trial for the sake of example and by way of punishing Defendants.

THIRTEENTH CAUSE OF ACTION

(For An Accounting Against Flick, Creative Cafe, and Does 1 through 50, inclusive)

60. Weddington repeats and realleges each and every allegation set forth in paragraphs 1 through 3, inclusive, 5 through 10, inclusive, 12, 14 through 17, inclusive, 20 through 22, inclusive, 24 through 26, inclusive, 32 through 34, inclusive, 40 through 41, inclusive, 43 through 44, inclusive, 46, 48, 50 through 53, inclusive, and 56 through 58, inclusive, of this Complaint, and the same are incorporated herein by reference as though set forth in full herein.

61. By reason of the acts alleged herein, Defendants have collected money, the amount of which is not known to Weddington, that by operation of law belongs to Weddington.

62. Weddington has demanded that Defendants account to Weddington for the monies collected by Defendants as aforesaid but Defendants have failed and refused, and continue to fail and refuse, to provide such an accounting.

63. Weddington is informed and believes, and based upon such information and belief alleges, that on an accounting by Defendants, there will be found to be a balance due to Weddington, by reason of the acts and things alleged herein, the amount of which is not known to Weddington.

64. An accounting is necessary to show the amount due to Weddington from Defendants, by reason of the acts and things alleged herein, and the amount due would be shown by such an accounting.

FOURTEENTH CAUSE OF ACTION

(For Money Had and Received Against Flick and Does 1 through 50, inclusive)

65. Weddington repeats and realleges each and every allegation set forth in paragraphs 1 through 3, inclusive, and 7, of this Complaint, and the same are incorporated herein by reference as though set forth in full herein.

66. Within two years last past, within the County of Los Angeles, State of California, Defendants became indebted to Weddington in the sum of $246,084.22 for money had and received by Defendants for the use and benefit of Defendants.

67. Neither the whole nor any part of said sum has been paid, although demand therefore [sic] has been made, and there is now due, owing and unpaid the sum of $246,084.22 from Defendants to Weddington together with interest thereon at the legal rate.

FIFTEENTH CAUSE OF ACTION

(For Money Lent Against Flick and Does 1 through 50, inclusive)

68. Weddington repeats and realleges each and every allegation set forth in paragraphs 1 through 3, inclusive, 7, and 67, of this Complaint, and the same are

incorporated herein by reference as though set forth in full herein.

69. Within the past four years, within the County of Los Angeles, State of California, Defendants became indebted to Weddington in the principal sum of $246,084.22 for money lent by Weddington to Defendants at Defendants special instance and request.

SIXTEENTH CAUSE OF ACTION

(For Money Due on an Open Book Account Against Flick and Does 1 through 50)

70. Weddington repeats and realleges each and every allegation set forth in paragraphs 1 through 3, inclusive, 7 and 67 of this Complaint and the same are incorporated herein by reference as though set forth in full herein.

71. Within the past four years, within the County of Los Angeles, State of California, Defendants became indebted to Weddington in the sum of $246,084.22 on an open book account for advances made and monies lent by Weddington to Defendants at Defendants' special instance and request.

72. By operation of law pursuant to Civil Code Section 1717.5, Weddington is entitled to recover reasonable attorneys' fees on the open book account obligation owed by Defendants to Weddington as alleged herein. In order to enforce its rights to recover on the open book account obligation of Defendants, Weddington has engaged Tom Lallas and Levy, Small & Lallas to institute and prosecute this action.

WHEREFORE, Weddington prays for judgment against Defendants, and each of them, as follows:

1. On the First Cause of Action against Flick and Does 1 through 50, inclusive, for:

(a) Damages in an amount according to proof but in no event less than the sum of $500,000 together with interest thereon at the maximum legal rates; and

(b) Punitive damages according to proof.

2. On the Second Cause of Action against Flick and Does 1 through 50 for:

(a) Judgment that Weddington is entitled to immediate and exclusive of [sic] possession of the Jaguar, free and clear of any purported interest of Defendants; and

(b) Judgment that the Jaguar be delivered to Weddington or, to the extent that possession of the Jaguar cannot be delivered to Weddington, that Weddington recover against Defendants an amount according to proof that satisfies all obligations of Weddington under the Lease.

3. On the Third Cause of Action against Flick, Creative Cafe, Beville, and Does 1 through 50, inclusive:

(a) Judgment that Weddington is entitled to immediate and exclusive possession of the Library, free and clear of any purported interest of Defendants; and

(b) Judgment that the Library be delivered to Weddington, or to the extent that possession cannot be delivered, that Weddington recover judgment against

Defendants according to proof but in no event less than the sum of $1,000,000 together with interest thereon at the maximum legal rate.

4. On the Fourth Cause of Action against Flick, Creative Cafe, and Does 1 through 50, inclusive, for a preliminary and permanent injunction mandating that Defendants repay to Weddington the Stolen Proceeds together with interest thereon at the maximum rate provided by law.

5. On the Fifth Cause of Action against Flick, Creative Cafe, Beville, and Does 1 through 50, inclusive, for:

(a) A preliminary and permanent injunction enjoining Defendants and their agents from directly or indirectly, by any means, using the Library, soliciting business from any of Weddington's clients or customers, or performing Sound Production services for any of Weddington's clients or customers; and

(b) Mandating that Defendants shall deliver to Weddington all copies of the Library in the possession of Defendants.

6. On the Sixth Cause of Action against Flick and Does 1 through 50, inclusive, for:

(a) Damages according to proof but in no event less than the sum of $129,605 together with interest thereon at the maximum legal rate; and

(b) Punitive damages according to proof.

7. On the Seventh Cause of Action against Flick, Creative Cafe, Beville, and Does 1 through 50, inclusive, for:

(a) Damages according to proof but in no event less than the sum of $1,000,000 together with interest thereon at the maximum legal rate; and

(b) Punitive damages according to proof.

8. On the Eighth Cause of Action against Flick and Does 1 through 50, inclusive, for:

(a) Damages according to proof but in no event less than the sum of $50,000 together with interest thereon at the maximum legal rate; and

(b) Punitive damages according to proof.

9. On the Ninth Cause of Action against all Defendants for:

(a) General damages according to proof but in no event less than the sum of $1,000,000;

(b) Punitive damages according to proof; and

(c) A preliminary and permanent injunction enjoining Defendants and their agents from doing or causing to be done, directly or indirectly, by any means, any of the following acts:

(i) Using the Library;

(ii) Soliciting business from any of Weddington's clients or customers; and

(iii) Performing Sound Production services for any of Weddington's Sound Production customers or clients.

10. On the Tenth Cause of Action against all Defendants for:

(a) General damages according to proof but in no event less than the sum of $1,000,000;

(b) Punitive damages according to proof;

(c) A preliminary and permanent injunction enjoining Defendants and their agents from doing or causing to be done, directly or indirectly, by any means, any of the following acts:

(i) Using the Library;

(ii) Soliciting business from any of Weddington's clients or customers; and

(iii) Performing Sound Production services for any of Weddington's Sound Production customers or clients.

(d) The recovery of reasonable attorneys' fees incurred in this action by Weddington.

11. On the Eleventh Cause of Action against all Defendants for:

(a) General damages according to proof but in no event less than the sum of $1,000,000;

(b) Punitive damages according to proof; and

(c) A preliminary and permanent injunction enjoining Defendants and their agents from doing or causing to be done, directly or indirectly, by any means, any of the following acts:

(i) Using the Library;

(ii) Soliciting business from any of Weddington's clients or customers; and

(iii) Performing Sound Production services for any of Weddington's Sound Production customers or clients.

12. On the Twelfth Cause of Action against all Defendants for:

(a) General damages according to proof but in no event less than the sum of $1,000,000;

(b) Punitive damages according to proof; and

(c) A preliminary and permanent injunction enjoining Defendants and their agents from doing or causing to be done, directly or indirectly, by any means, any of the following acts:

(i) Using the Library;

(ii) Soliciting business from any of Weddington's clients or customers; and

(iii) Performing Sound Production services for any of Weddington's Sound Production customers or clients.

13. On the Thirteenth Cause of Action against Flick, Creative Cafe, and Does 1 through 50, inclusive, for an order that Defendants account to Weddington for all money collected by Defendants by reason of the acts and things alleged therein, and pay Weddington all such monies collected by Defendants together with interest thereon at the maximum rate provided by law.

14. On the Fourteenth Cause of Action against Flick and Does 1 through 50, inclusive, for damages in the amount of $246,084.22 together with interest thereon at the maximum rate provided by law.

15. On the Fifteenth Cause of Action against Flick and Does 1 through 50, inclusive, for damages in the amount of $246,084.22 together with interest thereon at the maximum rate provided by law.

16. On the Sixteenth Cause of Action against Flick and Does 1 through 50, inclusive, for:

(a) Damages in the amount of $246,084.22 together with interest thereon at the maximum rate provided by law; and

(b) Reasonable attorneys' fees in accordance with Section 1717.5 of the Civil Code.

17. On each Cause of Action against all Defendants for:

(a) Costs of suit incurred herein; and

(b) Such other and further relief as the Court may deem just and proper.

DATED: December 12, 1995

TOM LALLAS
LEVY, SMALL & LALLAS
A Partnership Including
Professional Corporations

By /s/ Tom Lallas
TOM LALLAS
Attorneys for Plaintiff
Weddington Productions, Inc.

R. APP. 2

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and Steve Flick's Creative Cafe

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

(Filed Jan. 16, 1996)

WEDDINGTON PRODUCTIONS, INC., a California corporation, Plaintiff, vs. STEPHEN FLICK, an individual, STEVE FLICK's CREATIVE CAFE, a purported corporation, DEAN BEVILLE, an individual; and DOES 1 through 75, Defendants.	CASE NO. BC140705 ANSWER OF DEFENDANTS STEPHEN FLICK AND STEVE FLICK's CREATIVE CAFE TO VERIFIED COMPLAINT

DEFENDANTS STEPHEN FLICK ("Flick") AND STEVE FLICK's CREATIVE CAFE ("Creative Cafe") ANSWER THE VERIFIED COMPLAINT OF PLAINTIFF,

WEDDINGTON PRODUCTIONS, INC., A CALIFORNIA CORPORATION ("Weddington") AS FOLLOWS:

ANSWER TO PRELIMINARY ALLEGATIONS

1. Answering the allegations of paragraph 1, these answering defendants admit the same.

2. Answering the allegations of paragraph 2, these answering defendants admit the same.

3. Answering the allegations of paragraph 3, these answering defendants allege that they have no information or belief sufficient to enable them to answer the allegations, and basing their denial on such lack of information or belief, deny, generally and specifically, each and every allegation, matter or fact contained therein.

4. Answering the allegations of paragraph 4, these answering defendants allege that they have no information or belief sufficient to enable them to answer said allegations, and basing their denial on such lack of information and belief, deny, generally and specifically, each and every allegation, matter or fact contained therein.

5. Answering the allegations of paragraph 5, these answering defendants admit the same.

6. Answering the allegations of paragraph 6, these answering defendants deny the allegations of said paragraph wherein they state "Weddington is informed and believes and based upon such information and belief alleges that Steve Flick's Creative Cafe ("Creative Cafe"): (a) purports to be a corporation organized and existing under and by virtue of the laws of the State of California." Further answering paragraph 6, these answering

defendants admit that Steve Flick's Creative Cafe is doing business in the County of Los Angeles, State of California, was formed by Stephen Flick on or about July 13, 1995. Further answering paragraph 6, these answering defendants deny, generally and specifically, each and every other allegation, matter or fact contained therein.

7. Answering the allegations of paragraph 7, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein.

8. Answering the allegations of paragraph 8, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein.

9. Answering the allegations of paragraph 9, these answering defendants admit those allegations of paragraph 9 which state: "Flick is now, and at all times material thereto has been: (a) a shareholder of Weddington, and the owner of one-third of the outstanding stock of Weddington." Further answering the allegations of paragraph 9, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein which was not specifically admitted. Further answering paragraph 9, these answering defendants allege that as of July 1995, defendant Stephen Flick resigned as a member of the Board of Directors of Weddington and resigned as an officer of Weddington and has not, since that time, been on the Board of Directors or an officer of the corporation.

10. Answering the allegations of paragraph 10, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein.

ANSWER TO FIRST CAUSE OF ACTION

11. Answering the allegations of paragraph 11, this answering defendant repeat and incorporate herein by reference his answers to paragraphs 1 through 3, inclusive, and 7 through 10, inclusive, of this Complaint.

12. Answering the allegations of paragraph 12, this answering defendant denies, generally and specifically, each and every allegation, matter or fact contained therein.

13. Answering the allegations of paragraph 13, this answering defendant denies, generally and specifically, each and every allegation, matter or fact contained therein.

14. Answering the allegations of paragraph 14, this answering defendant denies, generally and specifically, each and every allegation, matter or fact contained therein.

15. Answering the allegations of paragraph 15, this answering defendant denies, generally and specifically, each and every allegation, matter or fact contained therein.

16. Answering the allegations of paragraph 16, this answering defendant denies, generally and specifically, each and every allegation, matter or fact contained therein.

17. Answering the allegations of paragraph 17, this answering defendant denies, generally and specifically, each and every allegation, matter or fact contained therein, and further answering said paragraph, denies that Weddington has been damaged at all.

18. Answering the allegations of paragraph 18, this answering defendant denies, generally and specifically, each and every allegation, matter or fact contained therein.

ANSWER TO SECOND CAUSE OF ACTION
BY DEFENDANT STEPHEN FLICK

19. Answering the allegations of paragraph 19, this answering defendant repeats and incorporates herein by reference his answers to paragraphs 1 through 3, inclusive, and paragraph 7, of the Complaint, as though fully set forth at length hereafter.

20. Answering the allegations of paragraph 20, this answering defendant admits the same.

21. Answering the allegations of paragraph 21, this answering defendant denies, generally and specifically, each and every allegation, matter or fact contained therein.

22. Answering the allegations of paragraph 22, this answering defendant denies, generally and specifically, each and every allegation, matter or fact contained therein.

ANSWER TO THIRD CAUSE OF ACTION
BY DEFENDANTS STEPHEN FLICK AND
STEVE FLICK's CREATIVE CAFE

23. Answering the allegations of paragraph 23, these answering defendants repeat and incorporate herein by this reference the answers to paragraphs 1 through 3, inclusive, 5 through 10, inclusive, and 14 and 15 of this Complaint as though fully set forth at length hereafter.

24. Answering the allegations of paragraph 24, this answering defendant denies, generally and specifically, each and every allegation, matter or fact contained therein.

25. Answering the allegations of paragraph 25, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein.

26. Answering the allegations of paragraph 26, this answering defendant denies, generally and specifically, each and every allegation, matter or fact contained therein.

ANSWER TO FOURTH CAUSE OF ACTION
BY DEFENDANT STEPHEN FLICK AND
STEVE FLICK's CREATIVE CAFE

27. Answering the allegations of paragraph 27, these answering defendants repeat and incorporate herein by this reference the answers to paragraphs 1 through 3, inclusive, 6 through 10, inclusive, and 13 of this Complaint, as though fully set forth at length hereafter.

28. Answering the allegations of paragraph 28, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein.

29. Answering the allegations of paragraph 29, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein.

30. Answering the allegations of paragraph 30, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein.

ANSWER TO FIFTH CAUSE OF ACTION BY DEFENDANTS STEPHEN FLICK AND STEVE FLICK'S CREATIVE CAFE

31. Answering the allegations of paragraph 31, these answering defendants repeat and incorporate herein by reference the answers to paragraphs 1 through 3, inclusive, 6 through 10, inclusive, and paragraphs 14 through 16, inclusive, of the Complaint, as though fully set forth at length hereafter.

32. Answering the allegations of paragraph 32, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein.

33. Answering the allegations of paragraph 33, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein.

34. Answering the allegations of paragraph 34, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein.

ANSWER TO SIXTH CAUSE OF ACTION BY DEFENDANT STEPHEN FLICK

35. Answering the allegations of paragraph 35, this answering defendant repeats and incorporates herein by this reference his answers to paragraphs 1 through 3, inclusive, 6 through 10, inclusive, and 12, 13, 17 and 18 of the Complaint, as though fully set forth at length hereafter.

36. Answering the allegations of paragraph 36, this answering defendant denies, generally and specifically, each and every allegation, matter or fact contained therein.

37. Answering the allegations of paragraph 37, this answering defendant denies, generally and specifically, each and every allegation, matter or fact contained therein.

38. Answering the allegations of paragraph 38, this answering defendant denies, generally and specifically, each and every allegation, matter or fact contained therein, and further answering said paragraph denies that the plaintiff has been damaged in any way whatsoever by the actions of defendant.

ANSWER TO SEVENTH CAUSE OF ACTION BY DEFENDANTS STEPHEN FLICK AND STEVE FLICK's CREATIVE CAFE

39. Answering the allegations of paragraph 39, these answering defendants repeat and incorporate by reference the answers to paragraphs 1 through 3, inclusive, 5 through 10, inclusive, and 15, 17, 18 through 38 of the Complaint, as though fully set forth at length hereafter.

40. Answering the allegations of paragraph 40, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein.

41. Answering the allegations of paragraph 41, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein.

ANSWER TO EIGHTH CAUSE OF ACTION BY DEFENDANTS STEPHEN FLICK

42. Answering the allegations of paragraph 42, this answering defendant repeats and incorporates herein by this reference his answers to paragraphs 1 through 3, inclusive, 7, 18, 20 through 22, inclusive, and 38 of the Complaint as though fully set forth at length hereafter.

43. Answering the allegations of paragraph 43, this answering defendant denies, generally and specifically, each and every allegation, matter or fact contained therein.

44. Answering the allegations of paragraph 44, this answering defendant denies, generally and specifically, each and every allegation, matter or fact contained therein.

ANSWER TO NINTH CAUSE OF ACTION BY DEFENDANTS STEPHEN FLICK AND STEVE FLICK's CREATIVE CAFE

45. Answering the allegations of paragraph 45, these answering defendants repeat and incorporate herein by this reference the answers to paragraphs 1 through 10, inclusive, and 13 through 18, inclusive, of the Complaint, as though fully set forth at length hereafter.

46. Answering the allegations of paragraph 46, the answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein.

ANSWER TO TENTH CAUSE OF ACTION BY DEFENDANTS STEPHEN FLICK AND STEVE FLICK's CREATIVE CAFE

47. Answering the allegations of paragraph 47, these answering defendants repeat and incorporate by reference the answers to paragraphs 1 through 10, inclusive, and 13 through 18, inclusive, of the Complaint as though fully set forth at length hereafter.

48. Answering the allegations of paragraph 48, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein.

ANSWER TO ELEVENTH CAUSE OF ACTION BY DEFENDANTS STEPHEN FLICK AND STEVE FLICK's CREATIVE CAFE

49. Answering the allegations of paragraph 49, these answering defendants repeat and incorporate herein by their reference the answers to paragraphs 1 through 10, inclusive, and 13 through 18, inclusive, of this Complaint, as though fully set forth at length hereafter.

50. Answering the allegations of paragraph 50, this answering defendant denies, generally and specifically, each and every allegation, matter or fact contained therein.

51. Answering the allegations of paragraph 51, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein.

52. Answering the allegations of paragraph 52, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein.

53. Answering the allegations of paragraph 53, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein, and further answering said paragraph deny that plaintiff is entitled to damages in an amount at all.

54. Answering the allegations of paragraph 54, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein.

ANSWER TO TWELFTH CAUSE OF ACTION BY DEFENDANTS STEPHEN FLICK AND STEVE FLICK's CREATIVE CAFE

55. Answering the allegations of paragraph 55, these answering defendants repeat and incorporate herein by this reference the answers to paragraphs 1 through 10, inclusive, 13 through 18, inclusive, and paragraphs 50 through 52, inclusive, of this Complaint, as though fully set forth at length hereafter.

56. Answering the allegations of paragraph 56, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein.

57. Answering the allegations of paragraph 57, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein.

58. Answering the allegations of paragraph 58, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein.

59. Answering the allegations of paragraph 59, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein.

ANSWER TO THIRTEENTH CAUSE OF ACTION BY DEFENDANTS STEPHEN FLICK AND STEVE FLICK's CREATIVE CAFE

60. Answering the allegations of paragraph 60, these answering defendants repeat and incorporate herein by reference the answers to paragraphs 1 through 3, inclusive, 5 through 10, inclusive, 12, 14, 17, 20 through 22, inclusive, 24 through 26, inclusive, 32 through 34, inclusive, 40 through 41, inclusive, 43 through 44, inclusive, 46, 68, 50 through 53, inclusive, and 56 through 58, inclusive, of the Complaint, as though fully set forth as length hereafter.

61. Answering the allegations of paragraph 61, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein.

62. Answering the allegations of paragraph 62, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein.

63. Answering the allegations of paragraph 63, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein.

64. Answering the allegations of paragraph 64, these answering defendants deny, generally and specifically, each and every allegation, matter or fact contained therein.

ANSWER TO FOURTEENTH CAUSE OF ACTION BY DEFENDANT STEPHEN FLICK

65. Answering the allegations of paragraph 65, this answering defendant repeats and incorporates herein by reference his answers to paragraphs 1 through 3, inclusive, and 7, of this Complaint, as though fully set forth at length hereafter.

66. Answering the allegations of paragraph 66, this answering defendant denies, generally and specifically, each and every allegation, matter or fact contained therein.

67. Answering the allegations of paragraph 67, this answering defendant denies, generally and specifically, each and every allegation, matter or fact contained therein, and further answering paragraph 67, denies that the defendant has been damaged in any sum whatsoever.

ANSWER TO FIFTEENTH CAUSE OF ACTION BY DEFENDANT STEPHEN FLICK

68. Answering the allegations of paragraph 68, this answering defendant repeats and incorporates herein by reference his answers to paragraphs 1 through 3, inclusive, 7, and 67, of the Complaint as though fully set forth at length hereafter.

69. Answering the allegations of paragraph 69, this answering defendant denies, generally and specifically, each and every allegation, matter or fact contained therein.

ANSWER TO SIXTEENTH CAUSE OF ACTION BY DEFENDANT STEPHEN FLICK

70. Answering the allegations of paragraph 70, this answering defendant repeats and incorporates herein by this reference his answers to paragraphs 1 through 3, inclusive, 7, and 67, of the Complaint, as though fully set forth at length hereafter.

71. Answering the allegations of paragraph 71, this answering defendant denies, generally and specifically, each and every allegation, matter or fact contained therein.

72. Answering the allegations of paragraph 72, this answering defendant denies, generally and specifically, each and every allegation, matter or fact contained therein.

FIRST AFFIRMATIVE DEFENSE

73. Plaintiff's first alleged cause of action fails to state facts sufficient to constitute a cause of action.

SECOND AFFIRMATIVE DEFENSE

74. Plaintiff's second alleged cause of action fails to state facts sufficient to constitute a cause of action.

THIRD AFFIRMATIVE DEFENSE

75. Plaintiff's third alleged cause of action fails to state facts sufficient to constitute a cause of action.

FOURTH AFFIRMATIVE DEFENSE

76. Plaintiff's fourth alleged cause of action fails to state facts sufficient to constitute a cause of action.

FIFTH AFFIRMATIVE DEFENSE

77. Plaintiff's fifth alleged cause of action fails to state facts sufficient to constitute a cause of action.

SIXTH AFFIRMATIVE DEFENSE

78. Plaintiff's sixth alleged cause of action fails to state facts sufficient to constitute a cause of action.

SEVENTH AFFIRMATIVE DEFENSE

79. Plaintiff's seventh alleged cause of action fails to state facts sufficient to constitute a cause of action.

EIGHTH AFFIRMATIVE DEFENSE

80. Plaintiff's eighth alleged cause of action fails to state facts sufficient to constitute a cause of action.

NINTH AFFIRMATIVE DEFENSE

81. Plaintiff's ninth alleged cause of action fails to state facts sufficient to constitute a cause of action.

TENTH AFFIRMATIVE DEFENSE

82. Plaintiff's tenth alleged cause of action fails to state facts sufficient to constitute a cause of action.

ELEVENTH AFFIRMATIVE DEFENSE

83. Plaintiff's eleventh alleged cause of action fails to state facts sufficient to constitute a cause of action.

TWELFTH AFFIRMATIVE DEFENSE

84. Plaintiff's twelfth alleged cause of action fails to state facts sufficient to constitute a cause of action.

THIRTEENTH AFFIRMATIVE DEFENSE

85. Plaintiff's thirteenth alleged cause of action fails to state facts sufficient to constitute a cause of action.

FOURTEENTH AFFIRMATIVE DEFENSE

86. Plaintiff's fourteenth alleged cause of action fails to state facts sufficient to constitute a cause of action.

FIFTEENTH AFFIRMATIVE DEFENSE

87. Plaintiff's fifteenth alleged cause of action fails to state facts sufficient to constitute a cause of action.

SIXTEENTH AFFIRMATIVE DEFENSE

88. Plaintiff's sixteenth alleged cause of action fails to state facts sufficient to constitute a cause of action.

SEVENTEENTH AFFIRMATIVE DEFENSE

89. By its conduct, plaintiff has waived the purported rights asserted in the Complaint on file herein.

EIGHTEENTH AFFIRMATIVE DEFENSE

90. By virtue of delay in asserting the purported claims herein, during the time which this answering defendant changed their position to their detriment, the claims of plaintiff herein are barred by the doctrine of laches.

NINETEENTH AFFIRMATIVE DEFENSE

91. By virtue of its conduct, in reliance upon which these answering defendants changed their position to their detriment, the plaintiff is estopped to assert the purported rights set forth in the Complaint on file herein.

TWENTIETH AFFIRMATIVE DEFENSE

92. If for any reason, it is found that the sum of $246,084.22, or any part of any of such sum, is owed by Flick to Weddington, as alleged in the Complaint and in the Application for Writ of Attachment, defendant Flick is owed by Weddington the total sum of $310,779.86. The amount of $310,779.86 is owed to Flick by Weddington. The total is computed as follows:

$219,605.00	(Portion of Draw due for period February 1, 1996 through July 31, 1996)
$ 31,759.00	(Additional Unpaid Draw due for services rendered by Flick to Weddington)
$ 42,974.17	(Labor Claim Penalties)
$ 15,000.00	(Loan)
$ 1,441.69	(Interest on Loan)
TOTAL $310,779.86	

The sums set forth above are owed by Weddington to Flick based upon agreements between Weddington and Flick pursuant to the following facts:

a. Weddington has operated informally from its formation. Very few meetings of Weddington's directors or officers have been conducted and each shareholder in Weddington, Richard Anderson ("Anderson"), Mark Mangini ("Mangini"), and Flick, have been relatively free to make decisions with respect to Weddington's operations. Wages, loan payments, cease payments, tax payments, and other checks have typically been drawn by each of the individuals without the consent of any other party, including amounts substantially in excess of $1,000.00. This was done on a regular and continuing basis with the knowledge of Anderson, Mangini and Flick.

b. At the organizational meeting of Weddington which was held on July 21, 1987, at which Mangini, Anderson and Flick were present, and the minutes of which were drafted by Richard Morganstern, corporate counsel, the method of payment for the officers, directors and shareholders of the corporation was established. Subject to the informalities discussed above, Weddington has, from July 1987, to the present, followed this method of payment. The minutes of the meeting of July 21, 1987 ("Weddington Minutes") provide as follows:

> "Each officer is entitled to receive as his gross earned compensation, the total aggregate amount of each officer's attributable billings for time devoted by the officer to clients of the corporation. Further, each officer is entitled to receive a periodic draw from the corporation so

> long as the aggregate draw in any fiscal year is less than the aggregate compensation to which the officer is entitled. Each officer is entitled to receive the balance of his earned compensation in excess of his aggregate draw upon his request, after the closure of the corporation's fiscal year books, completion of fiscal year accounting, and subject to availability of adequate funds to pay said balance."

A true and correct copy of the Weddington Minutes are attached hereto, marked as Exhibit A, and incorporated herein by this reference. The Minutes are signed by Mangini, Anderson and Flick.

c. Pursuant to the prior practices of Weddington, the Weddington minutes and the method of compensation employed by Weddington, Flick took a draw from the corporation based upon his attributable billings. These billings were based upon financial statements prepared by Weddington, by Weddington's inhouse bookkeeper Millie Want, and by Curtis Abramson of Braverman, Codron & Co., Weddington's outside auditors. Attached hereto, marked as Exhibit B, and incorporated herein by this reference is a statement prepared by Millie Want, and entitled "SplitOut of P/L – 6/30/95" (the "Weddington June 30, 1995 Statement"). Exhibit B hereto was faxed to Flick by Millie Want, from Weddington Accounting on October 12, 1995. The Weddington June 30, 1995 Statement, prepared by Weddington, as of June 30, 1995, shows that Flick was owed $245,720.33, for his attributable billings. Accordingly, Flick was entitled to payment of $245,720.33, pursuant to the practices of Weddington, the Weddington minutes and the method of compensation employed by

Weddington from 1987 to the present and followed by Mangini, Anderson and Flick.

d. The Weddington June 30, 1995 Statement, Exhibit "B" also shows that Flick was entitled to the repayment of a loan Flick made to Weddington, in the amount of $15,076.51, plus interest earned on the loan in the amount of $1,363.00. Flick has not been repaid this amount up to this point in time.

e. The statement entitled "SplitOut of P/L - 7/31/95" is attached hereto, marked as Exhibit C, and incorporated herein by this reference (the "Weddington July 31, 1995 Statement". This statement was also prepared by Millie Want of Weddington Accounting and was provided to Flick also, on October 12, 1995, by Millie Want. As can be seen from the Weddington July 31, 1995 Statement, attached as Exhibit C hereto, the statement shows a balance due Flick of $226,085 as of July 31, 1995. In addition, the statement, attached hereto as Exhibit C, shows that Flick is still owed the $15,000.00 that Flick made as a loan to Weddington, plus $1,363.00 for the interest earned on that loan.

f. The statement attached hereto as Exhibit D, and incorporated herein by this reference, was prepared by Curtis Abramson of Braverman, Codron & Co. on August 29, 1995 (the "Weddington August 29, 1995 Statement") and was provided to Flick on August 29, 1995. This statement, prepared by Braverman, Codron & Co. and Curtis Abramson was prepared at the request of Weddington, as Braverman, Codron & Co. and Curtis Abramson were Weddington's outside accountants. The statement, attached hereto as Exhibit D, shows that Flick

was due, as of July 31, 1995, the sum of $226,985, as his allocation of the profits per "Millie Analysis," which refers to Millie Want, Weddington's in-house bookkeeper. The adjusted gross amount which is shown on the statement, Exhibit D hereto, owed to Flick, as of July 31, 1995, is $246,881.

g. Consistent with the prior practices of Weddington, the Weddington Minutes, the method of compensation employed by Weddington and the past practices of withdrawal of funds by Mangini, Anderson and Flick, Flick withdrew the amount of $129,605.00 on or about October 13, 1995, which brought his total compensation paid for the 1996-7 fiscal year to $219,605.00. (The sum of $219,605.00 includes the $90,000.00 which is discussed below) This is still less than what was owed to Flick according to the statement prepared by Millie Want, attached as Exhibit B hereto, the statement prepared by Millie Want, attached as Exhibit C hereto, and the accounting from Curtis Abramson, attached as Exhibit D hereto. Flick is still owed, as of this date, the sum of $31,759.00, for services rendered to Weddington. Flick has filed a claim with the State Labor Commissioner for payment of this amount due him from Weddington. Attached hereto, marked as Exhibit E, and incorporated herein by this reference, is a true and correct copy of the claim that Flick has filed with the State Labor Commissioner with regard to the compensation that is due Flick from Weddington. Exhibit "E" also shows the penalties owing from Weddington to Flick in the amount of $42,974.17.

h. At all times Flick has acted and did act in accordance with the past practices of Weddington and Flick has not yet received the full amount of his attributable

billings which were owed to him at the time Flick left Weddington. Flick has relied upon the accountings provided to him by Weddington Accounting and by Millie Want, as well as the accountings provided by Curtis Abramson of Braverman, Codron & Co., Weddington's outside auditor, all of which show that Flick was owed at least $246,881, as of July 31, 1995 (according to Exhibit B hereto) and at least $245,720.33, as of June 30, 1995 (Exhibit C).

i. On August 30, 1995, Flick was paid $90,000 by Weddington as a periodic draw which was consistent with the Weddington Minutes, Exhibit A hereto, and the practices of Weddington. Mangini and Anderson have stated that this was a buyout advance. That is a complete fabrication. The $90,000 was not a buyout advance. The parties never agreed to a buyout. This perjurious statement is contradicted by the financial statements prepared by Weddington's in-house accountant, Millie Want, who has shown the advance as a loan and not as a buyout. A copy of the financial statement of Weddington entitled "Profit/Loss by Partners as of September 30, 1995," prepared by Millie Want, Weddington's in-house accountant, showing the $90,000 as an advance is attached hereto as Exhibit F, and incorporated herein by reference. The parties had agreed that the $90,000 would be advanced as a draw, which would be converted to salary in January 1996. This agreement is evidenced by the letter of Roger Halfhide dated September 19, 1995, and noted at Page 1 of such letter which is attached hereto marked as Exhibit G and incorporated herein by reference. There is no way in the world that Flick would have agreed to any terms for a buyout unless those terms were set forth in writing.

There is no way in the world that Flick would have agreed to any terms or a buyout unless Flick first consulted with his attorney, Richard Schneider, concerning those terms. There is no writing whatsoever which shows that a buyout agreement contained the term that Flick was given the $90,000 referred to in the Declarations of Mangini and Anderson, as part of that buyout agreement or a buyout advance. No such writing exists because no such buyout agreement or buyout advance agreement exists. Flick did not agree to any terms with regard to a buyout. Flick did not present any terms of a buyout to his attorney. The $90,000 payment to Flick had absolutely nothing whatsoever to do with a buyout, a buyout agreement, or a buyout advance.

j. As noted before, the Declarations of Mangini and Anderson contain the assertion that the $90,000 that was paid to Flick by Weddington on August 30, 1995, was based upon payment under some type of buyout agreement. As Mangini and Anderson have stated themselves, no buyout agreement has been entered into between the parties. Weddington, Mangini and Anderson have consistently argued during negotiations concerning a buyout agreement that Weddington has no preeminent reputation and no goodwill in the sound production business.

k. Based upon the above, pursuant to agreements entered into between Flick and Weddington the total sum of $310,779.86 is owing from Weddington to Flick.

TWENTY-FIRST AFFIRMATIVE DEFENSE

93. Richard Morganstern served as corporate counsel for Weddington Productions for approximately eight

years terminating in 1995. On January 4, 1995, Mark Mangini, Richard Anderson and Stephen Flick requested that Richard Morganstern prepare a Sound Effects Library Agreement to clarify and compromise the ownership of the Sound Effects Library and all of its constituent parts.

94. A copy of Richard Morganstern's letter acknowledging his preparation of the Sound Effects Library Agreement on behalf of and addressed to Richard Anderson, Stephen Flick and Mark Mangini as well as to Weddington Productions, Inc., which letter included the Sound Effects Library Agreement, is attached hereto as Exhibit G and incorporated herein by reference.

95. Morganstern provided a copy of the Sound Effects Library Agreement to Anderson, Flick and Mangini by telefax on February 14, 1995. This exact Sound Effects Library Agreement which had been prepared at the request of Anderson, Flick and Mangini, and which had been provided to Anderson, Flick and Mangini as well as Weddington Productions on February 14, 1995, was submitted to a duty called meeting of the Board of Directors of Weddington on April 10, 1995, which was attended by Richard Anderson, Stephen Hunter Flick, and Mark Mangini.

96. A binding resolution and agreement was adopted at a duly called meeting of the Board of Directors of Weddington on April 10, 1995 regarding the Sound Effects Library Agreement. The meeting was attended by all of the directors of Weddington consisting of Richard Anderson, Stephen Hunter Flick and Mark Mangini. Pursuant to the bylaws of Weddington, a majority of the

directors approved the resolution adopting the Sound Effects Library Agreement and approving the terms and conditions of the Sound Effects Library Agreement. The Board Resolutions of the Weddington Board of Directors provide as follows:

> "RESOLVED, that Weddington Productions, Inc., hereby approves the signing of the Sound Effects Library Agreement on behalf of Weddington Productions, Inc., and hereby approves the terms and conditions of the Sound Effects Library Agreement."

97. Prior to the execution of the Sound Effects Library Agreement, the Sound Effects Library was owned as tenants in common by Richard Anderson, Stephen Hunter Flick and Mark Mangini. The Sound Effects Library Agreement is designated as the Anderson-Flick Library in large part, because the Sound Effects Library was originated in part by Richard Anderson and Stephen Hunter Flick. Mark Mangini assisted in the preparation of only a portion of the Library. The ownership of the Sound Effects Library by the individuals prior to the execution of the Sound Effects Library Agreement is borne out by the Sound Effects Library Agreement executed and ratified by Weddington. The Sound Effects Library Agreement provides in Section 3 as follows:

> "All commercialization and/or exploitation of the Library or any portions thereof apart from the rendering of post production sound effects editing services rendered by the parties hereto may be undertaken only with the unanimous agreement of Anderson, Flick and Mangini subject to the following:

a. All net revenues received from such commercialization and/or exploitation of the Library shall be shared equally among Anderson, Flick and Mangini except as provided in subparagraph b, infra."

98. The Sound Effects Library Agreement provides that Stephen Hunter Flick may, upon any voluntary or involuntary termination from Weddington, use the entire Sound Effects Library Agreement for the purpose of competing with Mangini, Anderson and Weddington. The Sound Effects Library Agreement provides in Section 2 as follows:

"In the event that either Anderson, Flick or Mangini terminates employment with Weddington (whether such termination is voluntary or involuntary), the following shall occur:

a. The terminated party shall have a royalty free, full paid up right and license to utilize the Library as it exists as of the effective date of termination in connection with the rendering of post production sound effects editing services to others provided that such services are rendered by the terminated party.

b. To facilitate the above, Weddington shall provide the terminated party with one copy of the Library as it exists as of the date of termination.

c. The terminated party shall not have any right or license to any additions to the Library made after the date of termination."

99. Mangini and Anderson have contended that the value of Weddington is equal to the value of its equipment only. They have consistently insisted both through

their counsel and verbally that Weddington has a value equal only to the value of its equipment, which does not in any document or in any statement they have made include the Sound Effects Library. In fact, they have consistently insisted upon a value of Weddington equal to the value of its equipment only without the Sound Effects Library. Mangini and Anderson have thus acknowledged that the Sound Effects Library is not an asset of Weddington, unless the Sound Effects Library is considered to be effective. Even in such case, the Sound Effects Library provides that apart from the use permitted to Stephen Hunter Flick for his business, that the commercialization of the Library shall be undertaken by Anderson, Flick and Mangini as individuals, since the Sound Effects Library was individually owned. Commercialization constitutes the sale of the Library through compact disc or other medium in the general public. The other use provided for in Section 2 of the Sound Effects Library Agreement as described above, permits Stephen Hunter Flick to use the Library on a royalty-free, fully paid-up basis, in connection with a competing business.

TWENTY-SECOND AFFIRMATIVE DEFENSE

100. Mark Mangini and Richard Anderson accepted Steve Flick's resignation as an officer and director of Weddington. Neither Mangini nor Anderson, nor Weddington, provided any notice of any meeting, or any informal meeting, necessary to distribute funds in excess of $1,000 as alleged by Mangini and Anderson after the date of Flick's resignation. In fact, Anderson distributed a total of $156,000 to himself without consulting with Flick. Obviously, he did so in recognition of the fact that Flick

was no longer an officer and director of the company after July, 1995.

101. Weddington, Mangini and Anderson also recognize the fact that they had consented to Flick's leaving the company and entering into his present business. In fact, they directed the receptionist of Weddington to direct all of Flick's calls and correspondence to him. They directly assisted in the ongoing business of Flick's new company by referring business calls and mail to him and did not object to referring such calls to him, and this fact is set forth in Mangini's Declaration as follows:

> "Anderson and I have repeatedly told Amber Williams, the Weddington receptionist, to forward all calls and mail for Flick and Creative Cafe to the new telephone number and address for Creative Cafe that Flick gave to us himself. To the best of our knowledge, each phone call and piece of correspondence for Flick received by Weddington has been forwarded consistent with these instructions." (Declaration of Mark Mangini dated January 9, 1996, Page 18, Lines 24 through 28, and Page 19, Line 1 filed in support of Motion for Preliminary Injunction.)

TWENTY-THIRD AFFIRMATIVE DEFENSE

102. After Stephen Hunter Flick left Weddington, responsibility for the payment of the lease payments on the Jaguar driven by Stephen Hunter Flick was transferred to Stephen Hunter Flick. Weddington no longer makes the lease payments, and accordingly has no interest in the Jaguar. Weddington cannot attach or recover

possession of an automobile which it has already transferred to Flick, and for which Flick, after his employment, has assumed responsibility for payment of the lease.

WHEREFORE, defendants Stephen Flick and Steve Flick's Creative Cafe pray as follows:

1. That plaintiff take nothing by way of its Complaint;

2. That defendants be awarded costs of suit;

3. That defendants be awarded attorneys fees pursuant to applicable law; and

4. For such other and different relief as this Court deems just and proper.

Dated: January 9, 1996

/s/ Robert L. Becking
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R. APP. 3

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

(Filed Dec. 13, 1995)

WEDDINGTON PRODUCTIONS, INC., a California Corporation, Plaintiff, v. STEPHEN FLICK, an individual, STEVE FLICK'S CREATIVE CAFE, a purported corporation, DEAN BEVILLE, an individual; and DOES 1 through 75, Inclusive, Defendants.	) CASE NO. BC 140 705)) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION; DECLARATIONS OF MARK MANGINI, RICHARD ANDERSON, AND TOM LALLAS)) Date: December 29, 1995) Time: 9:30 a.m.) Dept: 85

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I. PRELIMINARY STATEMENT

A. Introduction.

Stephen Flick ("Flick"), the President, a Director, and a one-third shareholder in Weddington Productions ("Weddington"), a successful sound production company known throughout the entertainment industry, has embarked on a crusade to destroy Weddington. After unsuccessfully attempting to negotiate an amicable buyout of his interest in Weddington, Flick has deliberately plotted to destroy Weddington by: (i) forming a competing corporation solely owned and controlled by Flick, (ii) soliciting Weddington's clients, (iii) misappropriating Weddington's trade secrets, and (iv) converting to his own use for the benefit of his competing corporation, and to the detriment of Weddington, the sound effects library owned and used by Weddington to mix soundtracks and provide sound effects for feature

length motion pictures, television movies, television programming, commercials, documentaries, and other entertainment events.

In orchestrating and implementing this predatory conduct, Flick has breached fiduciary duties, engaged in unfair competition, misappropriated Weddington trade secrets, interfered with Weddington's economic advantage, diverted revenue that would otherwise have been generated by Weddington, unlawfully solicited Weddington's customers, and conspired to destroy Weddington. Injunctive relief is essential to prevent Weddington from suffering irreparable injury.

B. Detailed Statement of Facts.

1. Weddington Productions.

Weddington is a production company engaged in the business of providing sound editing and sound effects services for, among other things, feature length motion pictures, movies made for television, television programs, commercials and other entertainment programs ("Sound Production"). [MMD ¶ 3]

Stephen Flick ("Flick") is: (a) a shareholder of Weddington, and the owner of 1/3 of the outstanding stock of Weddington; (b) a member of the Board of Directors of Weddington; and (c) a corporate officer (and most recently President since May 1995) of Weddington. [MMD ¶ 4] At all times material hereto, the three shareholders of Weddington have been Flick, Richard Anderson ("Anderson") and Mark Mangini ("Mangini"). Flick, Anderson and Mangini each own one-third of Weddington.

Weddington has established a preeminent reputation as a leading Sound Production company in the Sound Production business. Weddington is well known as a leading company in the Sound Production business. [MMD ¶ 6]

During the past year, Anderson and Mangini have had discussions with Flick regarding a severance of their relationship with Flick. In this regard, there were four issues that needed to be resolved. These issues included: (a) purchasing Flick's interest in Weddington; (b) purchasing Flick's interest in the building where Weddington is located; (c) resolving the amount of and paying Flick's bonus; and (d) rights of access to and use of the sound effects library owned by Weddington. [MMD ¶ 7]

2. Weddington Owns the Sound Library.

The sound effects library ("Library") is Weddington's most valuable asset. It was developed from the services rendered by Anderson, Flick, and Mangini, and other employees of Weddington. The Library is: (a) Proprietary to and a trade secret of Weddington; (b) Not generally available to competitors of Weddington in the Sound Production business; and (c) A specific and unique asset whose attributes would allow any company to compete effectively in the Sound Production business. [MMD ¶ 19]

The Library is stored on a digital master tape and other media (collectively, the "Master Tape"), and various copies of the Master Tape have been made by Weddington. Weddington holds all right, title and interest in and to the Library, the Master Tape, the computer database, and each copy thereof. [MMD ¶ 20]

The Library is a computer catalogued collection of master audio recordings. Weddington exploits the use of this Library commercially and for profit by copying it selectively for the purpose of creating and augmenting the soundtracks in motion pictures, television, commercials and other entertainment related enterprises where audio playback is present. [MMD ¶ 21]

For example, when a motion picture is shot, only the voices of the actors are recorded. Once a version of the film is assembled by the film editor, a working copy of the film is given to the sound editors at a company like Weddington, where the sound effects are then added to the recordings made on the set or location to round out and complete the sound track. These sound effects include generic sounds like: gunshots, explosions, car skids, dog barks, etc., and include exotic sounds that do not exist in reality like creature voices, futuristic vehicles and weaponry, alien atmospheres, etc.

The Library consists of two major components, neither of which is useful without the other. [MMD ¶ 22] The first is the physical media on which the master sounds are recorded and stored. This is primarily in the digital audio tape ("DAT") format and it is on this format that Flick has misappropriated a copy of the Library. He is in possession of approximately 850 DAT tapes and their storage cabinets. [MMD ¶ 23] The second is the proprietary relational data base program and attendant data files that are used for searching, cataloguing and organizing the sound effects library. This program and its data files exist only in computer memory but can be copied, and in Weddington's specific case were copied, by transferring the program and the data files to a digital

streamer tape to be loaded into Flick's computer system. [MMD ¶ 24]

The Library is comprised of approximately 1600 hours of master audio recordings gathered, recorded, created, bought, and borrowed. The Master Tapes reside at the Weddington facility and at its storage facility. [MMD ¶ 25]

The Library audio recordings reside on several current sound recording media including DAT, 1/4" reel to reel tape, 35mm magnetic rolls, 8mm exabyte tape, 2" 24 track analog tape, cassette etc. In its most useful and commercially exploitable form, it resides on approximately 850 DAT tapes of which Weddington has made three entire work copies, one of which Flick has misappropriated. The DAT copy of the sounds in the Library is the most comprehensive collection of all of the sounds comprising the entire sound effects Library and as such contains redundant copies of sounds stored on other media for the purposes of ease of access and review. [MMD ¶ 26]

Much of the success of Weddington is due to the freshness, quality, size, and organization of its Library. A Library is an indispensable tool to anyone in the sound editing business, Weddington's primary source of revenue. One cannot conduct a sound editing business or a successful, Academy Award winning business without a high quality and well catalogued sound library. [MMD ¶ 29]

Weddington distinguished itself initially by being one of the few companies creating new, fresh sound effects at a time when its competitors were still relying on

older established libraries recorded using inferior and out of date technology. Weddington furthered its competitive edge by commissioning a one of a kind relational data base program used to catalogue and search through the Library. To this day, this relational database program has only one commercial competitor, albeit not as good, and gives Weddington a significant advantage in its ability to access the sounds in the Library and do business on a competitive level. [MMD ¶ 30]

3. Flick Is Unlawfully Competing With Weddington.

Flick formed a competing company, Steve Flick's Creative Cafe ("Creative Cafe"), engaged in the Sound Production business in order to compete with Weddington, service Weddington's clients, divert business and revenue from Weddington, and use Weddington's proprietary trade secrets to Flick's advantage and to the detriment of Weddington. [MMD ¶ 38] Flick and Creative Cafe have, in their possession, and are using, one or more copies of the Library and computer database to compete with Weddington in the Sound Production business. [MMD ¶ 41]

At or about the time Flick withdrew from Weddington, he ceased having any involvement in the day-to-day operations of Weddington. However, Flick did not ask Weddington, Anderson, or Mangini, to consent or agree that Flick could open a new business competing with Weddington, Creative Cafe. Furthermore, Weddington, Anderson, and Mangini did not consent or agree that Flick could open Creative Cafe and compete with Weddington. Flick owes Weddington fiduciary duties as a

shareholder and President of Weddington, and to the extent that Flick has opened a new business, Creative Cafe, is competing with Weddington, and is using the Library, a proprietary trade secret of Weddington, Flick is violating his duties owed to Weddington. [MMD ¶ 44]

4. Flick Stole Money From Weddington.

When it became apparent that Anderson and Mangini would be unable to amicably resolve the issues in dispute with Flick, without the approval or consent of Weddington, Anderson or Mangini, Flick stole $129,605 from Weddington. Flick wrote a check payable to himself in that amount (the "Fraudulent Check"). [MMD ¶ 45]

Thereafter, Flick negotiated the Fraudulent Check and converted the proceeds. Weddington, Anderson and Mangini did not know that Flick intended to draw and negotiate the Fraudulent Check. Weddington, Anderson and Mangini did not consent to Flick's acts in drawing and negotiating the Fraudulent Check. [MMD ¶ 46]

The drafting and endorsing of the Fraudulent Check by Flick was unauthorized, unapproved, without the consent of Weddington, Anderson or Mangini, and is an act of embezzlement from Weddington. [MMD ¶ 47]

5. Flick Has Conspired With Others to Harm Weddington.

Flick, Creative Cafe, and others acting under Flick's direction and control, have used the Library to provide Sound Production services to various clients in the entertainment industry. By way of example, Flick and Dean

Beville ("Beville"), the son of Flick's present wife, Judee Flick ("Judee") are now providing Sound Production Services to the following entities on the following projects [MMD ¶ 42]:

Films:	Production Companies:
"Alaska"	Castle Rock Entertainment 335 N. Maple Drive, #135 Beverly Hills, CA 90210 310-285-2300
"Mulholland Falls"	MGM/Zanuck Co. 2500 Broadway St. Santa Monica, CA 90404 310-449-3000
"Twister"	Amblin 100 Universal City Plaza Bungalow #477 Universal City, CA 91608
"From Dusk 'till Dawn"	Los Hooligans/Miramax Films Corp. 375 Greenwich St. NY, NY 10013 212-941-3800

The Production Companies with whom Flick and Creative Cafe are doing business are present and former clients of Weddington. If Flick did not have access to the Library, Flick could not perform services for, or meet the needs, of the Production Companies. Thus, Flick has deprived Weddington of the revenue generated by the film projects for the Production Companies listed above by misappropriating Weddington's most valuable trade secret, its Library. By servicing these companies on these projects, Flick, Creative Cafe and Beville have diverted

revenue to themselves, and away from Weddington, in an amount in excess of approximately $500,000. [MMD ¶ 43]

6. Flick's Fraudulent Conduct is Continuing.

After Weddington discovered that Flick has engaged in a tortious course of conduct designed to injure Weddington in violation of fiduciary duties Flick owes as a shareholder, officer and director of Weddington, Weddington made a demand that Flick (i) repay Weddington the amount of the Fraudulent Check; (ii) deliver to Weddington its proprietary secrets in Flick's possession, including but not limited to the Library; (iii) disclose to Weddington all Weddington clients whom Flick and Creative Cafe have solicited; (iv) agree not to solicit any clients of Weddington whether directly or indirectly, and (v) account to Weddington for all revenue generated by Flick or Creative Cafe in competition with Weddington [Exhibit 5]. Flick ignored this demand and continues to violate his fiduciary duties by soliciting and providing sound production services to Weddington clients and misappropriating Weddington's trade secrets including, but not limited to, the Library.

II. A PRELIMINARY INJUNCTION SHOULD ISSUE TO PROTECT WEDDINGTON FROM SUFFERING IRREPARABLE INJURY

A. Standards for Issuance of Preliminary Injunction.

Injunctive relief is available under Section 526 of the Code of Civil Procedure when: (i) the plaintiff is entitled to the relief demanded and the relief consists of restraining acts continuing to occur, (ii) the acts committed by the

defendant would produce waste or great or irreparable injury, (iii) the acts committed by the defendant violate the rights of plaintiff and tend to render judgment ineffectual, (iv) pecuniary compensation is inadequate, and/or (v) it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief.

B. Injunctive Relief Should Be Granted To Prevent Irreparable Harm.

California courts in interpreting this section have held that the grant of a preliminary injunction rests within the sound discretion of the trial court. *Continental Baking Co. v. Katz*, 68 Cal. 2d 512, 527, 67 Cal. Rptr. 761 (1968). In *Robbins v. Superior Court*, 38 Cal. 3d 199, 211 Cal. Rptr. 398 (1985), the California Supreme Court noted:

> "Although the trial court has broad discretionary powers to grant or deny a request for a preliminary injunction, it has 'no discretion to act capriciously . . . ' [Citation omitted] It must exercise its discretion 'in favor of the party most likely to be injured.' [Citation omitted] If the denial of an injunction would result in great harm to the plaintiff, and the defendant would suffer little harm if it were granted, then it is an abuse of discretion to fail to grant the preliminary injunction." *Robbins, supra*, at 205.

An injunction is properly issued when there is a likelihood of irreparable injury to the party seeking a preliminary injunction. *Wind v. Herbert*, 186 Cal. App. 2d 276, 285, 8 Cal. Rptr. 817 (1960). In addition, the moving party must show that he has a reasonable probability of

success on the merits. *Continental Baking Co. v. Katz, supra,* at 528. Weddington has been irreparably injured by Flick's theft of the Library which has allowed Flick to form a competing company, solicit Weddington's clients, provide Sound Production services to Weddington's clients, and divert revenue from Weddington.

C. Injunctive Relief Is Necessary To Prevent Irreparable Injury To Weddington and to Preserve The Status Quo.

The concept of "irreparable injury" was discussed in *Wind v. Herbert, supra*:

> "The concept of 'irreparable injury' which authorized the interposition of a court of equity by way of injunction does not concern itself entirely with injury beyond the possibility of repair or beyond possible compensation and damages. . . . 'The term "irreparable injury" . . . means that species of damage *whether great or small, that ought not to be submitted to on the one hand or inflicted on the other.*" ' *Id.* at 285 (emphasis in original).

The California Supreme Court in *Robbins v Superior Court, supra* stated:

> "The trial courts consider two interrelated questions in deciding whether to issue a preliminary injunction: 1) are the plaintiffs likely to suffer a greater injury from a denial of the injunction than the defendants are likely to suffer from its grant; and 2) is there a reasonable probability that the plaintiffs will prevail on the merits. [Citations omitted] " '[By] balancing the respective equities of the parties, [the court] concludes

> that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the right claimed by him." ' [Citations omitted] 38 Cal. 3d at 206.

In determining whether there has been irreparable injury, it is appropriate for the Court to consider the defendants' ability to respond in damages. *West Coast Construction Co. Inc. v. Oceano Sanitary Dist.*, 17 Cal. App. 3d 693, 700, 95 Cal. Rptr. 169 (1971). In *West Coast Construction Co.* the Court considered whether an injunction was proper to restrain defendant from distributing the proceeds of a particular construction fund when the defendant Sanitary District had allegedly failed to pay plaintiff construction company for construction performed. *Id.* at 698. The court found that such an injunction was necessary to prevent irreparable injury and preserve the status quo, stating:

> "It was declared in an early case that mere monetary loss is not irreparable in contemplation of the remedy of injunction unless there is an averment or a showing that the party causing the loss are insolvent or in any manner unable to respond in damages. . . . 'Obviously, it was reasonably necessary and fair to both sides to maintain the status quo pending the outcome of the litigation. Otherwise, appellant could have deliberately stripped himself of all assets and made it impossible for him to pay any judgment that might be secured." *Id.* at 700 (emphasis added, citation omitted).

See also Duvall v. White, 46 Cal. App. 3d 305, 308 (1920).

Since the early case of *Duval v. White*, cited *supra*, other courts have recognized the fact that the asserted

insolvency of the defendant as well as the ability of the defendant to respond to damages in a matter which is proper for the court's consideration in deciding whether or not to issue an injunction. *See, e.g., Union Oil Co. v. Domengeaux*, 30 Cal. App. 2d 266, 271-272 (1939), *Lenard v. Edmonds*, 151 Cal. App. 2d 764, 769 (1957). *See also Weingand v. Atlantic Savings and Loan Association*, 1 Cal. 3d 806, 820, which as the court in the *West Coast* case pointed out, "gave approval to the concept that insolvency is related to irreparable injury." *West Coast*, at 702.

Flick does not have sufficient assets to respond in damages to Weddington, and the shell corporation he has formed, Creative Cafe, is functionally insolvent [MMD, ¶ 43]. Injunctive relief is necessary to preserve the legitimate interests of Weddington.

III. INJUNCTIVE RELIEF IS AVAILABLE TO PREVENT UNFAIR COMPETITION AND THE THEFT OF TRADE SECRETS

A. Flick Owes Weddington A Fiduciary Duty.

It is well settled under California law that a director owes fiduciary duties to the corporation for which he acts as a director. *General Advertising Agency Inc. v. Komer*, 251 Cal. App. 2d 805, 60 Cal. Rptr. 10, 12 (1967). If a director: " . . . misuses his position of trust to further his private interest at the expense of the corporation, he may be held liable for the damage or accountable for any benefits which he obtains thereby." [Citations omitted] *Id.*

Similarly, corporate officers stand in a fiduciary relationship both with their corporate employers and the shareholders of the corporation. *Lewis v. LeBaron*, 254 Cal.

App. 2d 270, 61 Cal. Rptr. 903, 911 (1967). See also *Sequoia Vacuum Systems v. Stransky*, 229 Cal. App. 2d 281, 40 Cal. Rptr. 203, 206 (1964). Thus, as stated in *Pigeon Point Ranch, Inc. v. Perot*, 59 Cal. 2d 227, 379 P. 2d 321, 28 Cal. Rptr. 865, 868 (1963): "A director or officer of a corporation acts in a fiduciary capacity, and the law does not allow him to secure any personal advantage as against the corporation." [Citation omitted]

The fiduciary obligation existing under California law imposes stringent obligations on directors and officers. In *Mueller v. MacBann*, 62 Cal. App. 3d 258, 132 Cal. Rptr. 222, 229, 230, (1976), the Court of Appeal stated:

> " . . . a director or dominant or controlling shareholder (or a group of stockholders) is a fiduciary whose dealings with the corporation are subject to rigorous scrutiny and that 'were any of their contracts or engagements with the corporation is challenged, the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interests therein.' . . . Directors owe a duty of highest good faith to the corporation and its stockholders, and this same duty is demanded of officers of the corporation. . . . It is a violation of this duty for officers, or directors or majority stockholders to give away or appropriate to themselves any corporate assets." [Citations omitted]

In this regard, the Supreme Court determined, in *Bancroft-Whitney Company v. Glen*, 64 Cal. 2d 327, 411 P. 2d 921, 49 Cal. Rptr. 825, 838 (1966) that corporate officers

and directors stand in a fiduciary relation to the corporation and its stockholders and public policy exists that has established a rule that demands that a corporate officer or director scrupulously observe this fiduciary duty "not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage."

B. Flick Is Prohibited From Unlawfully Competing With Weddington.

It is well established that a corporate officer or director is prohibited from entering into a competing business that cripples or injures the corporation, and to the extent that a corporate officer does so in violation of fiduciary duties owed to the corporation, the corporate entity may claim for itself all benefits so obtained. *Sequoia Vacuum Systems v. Stransky, supra,* 40 Cal. Rptr. at 206. See also *Xum Speegle Inc. v. Fields,* 216 Cal. App. 2d 546 at 554-555, 31 Cal. Rptr. 104 (1963). Moreover, *Sequoia Vacuum* establishes that a corporate officer and director: " . . . may not seize for himself, to the detriment of his company, business opportunities in the company's line of activities. 40 Cal. Rptr. at 206. When a corporate officer and director, owing fiduciary obligations, misappropriates a corporate opportunity, "the corporation may claim for itself all benefits so obtained. *Id.*

The Court of Appeal determined in *American Loan Corporation v. California Commercial Corporation,* 211 Cal. App. 2d 515, 26 Cal. Rptr. 243, 248 (1963) that: "Where a corporate officer seizes business opportunities unfairly to

the detriment of his company and in violation of his fiduciary duty, the corporation is entitled to recover all the profit of the transaction." [Citation omitted] See also *Industrial Indemnity Co. v. Golden State Co.*, 117 Cal. App. 2d 519, 533, 256 P. 2d 677 (1953).

In *American Loan Corporation*, the corporation and its sole shareholder filed an action against a person who had been a corporate officer and employee and a corporation for which the individual defendant was the president and director for damages and injunctive relief. The trial court granted an award of damages and an injunction in favor of the plaintiff and against the former employee. The former employee stole a customer list belonging to the corporate employer and after leaving his employment, solicited all of the customers of his former corporate employer. The former employee set up a competing business enterprise using confidential information belonging to his corporate employer. Based on these actions, the trial court concluded that the former employee violated his fiduciary duties, misappropriated business opportunities, was liable for damages to his former employer, and as a result of the foregoing, issued an injunction. The Court of Appeal affirmed that the trial court properly concluded that "the list of customers was confidential and was unfairly used by defendants to the detriment of plaintiffs." *Id* at 249. The Court of Appeal affirmed the injunction noting that: "The injunction herein merely prohibits the defendants from soliciting further business from such customers. It is not too broad." *Id.* [Citations omitted].

An injunction should issue to preclude Flick from using the Library, soliciting Weddington customers, or

providing Sound Production services to Weddington customers.

C. Flick Has Violated the Corporate Opportunity Doctrine.

The Court of Appeal affirmed the holding of the trial court that a director of the plaintiff corporation, in breach of his fiduciary obligations to the corporation, entered into a competing enterprise which injured the business of the corporation in *Xum Speegle Inc. v. Fields*, 216 Cal. App. 2d 546, 31 Cal. Rptr. 104, 106-107 (1963): "It is well settled that a director or officer of a corporation may not enter into a competing enterprise which cripples or injures the business of the corporation of which he is an officer or director." [Citations omitted] *Id.* at 106-107.

Moreover, *Xum Speegle* stands for the proposition that:

> "An officer or a director may not seize for himself, to the detriment of his company, business opportunities in company's line of activities which his company has an interest and prior claim to obtain. In the event that he does seize such opportunities in violation of his fiduciary duty, the corporation may claim for itself all benefits so obtained." [Citations omitted] *Id* at 107.

Thus, under the corporate opportunity doctrine, a corporation may claim for itself all benefits obtained by its officers or directors through their misappropriation for themselves, to the detriment of the corporation, business opportunities in the corporation's line of business.

See *New v. New*, 148 Cal. App. 2d 372, 384, 306 P. 2d 987 (1957). Accordingly "the directors or officers of a going, solvent corporation cannot, however, engage in a competing business to the detriment of the corporation which they represent."

D. Flick Has Misappropriated Weddington's Most Valuable Trade Secret.

The Uniform Trade Secrets Act, Civil Code §§ 3426-3426.10, defines a trade secret as information, including a formula, pattern, compilation, program, device, method, technique, or process that: (i) derives independent actual or potential economic value from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Civil Code § 3426.1(d).

In *Components For Research, Inc. v. Isolation Products Inc.*, 241 Cal. App. 2d 726, 50 Cal. Rptr. 829 (1966), the plaintiff filed an action to enjoin directors and their new corporate employer from misusing the corporate plaintiff's trade secrets in a manufacturing process. The trial court entered judgment for the corporate employer plaintiff and the defendants, appealed. First, the Court of Appeal stated that:

> "The Biancos [the directors] cannot claim the right to use plaintiff's secrets because they participated, as employees, in the development of the process, rather than learning an already-

> developed process when they entered that employ." [Citations omitted] 50 Cal. Rptr. at 831.

The Court of Appeal determined that:

> "Even in the absence of an express agreement against revelation of trade secrets, a director is under a fiduciary duty not to use or reveal them to the detriment of the corporation of which he is a director." [Citations omitted] *Id.*

The directors were liable for misappropriating corporate trade secrets because:

> "Both Biancos continued as directors of plaintiff long after they became directly associated in the operations of defendant corporation. Each took drawings and other materials for use by the new corporation. The evidence fully sustains the conclusion that they violated their fiduciary duty to plaintiff." *Id. See also Daniel Orifice Fitting Co. v. Whalen,* 198 Cal. App. 2d 791, 797-799, 18 Cal. Rptr. 659.

In *Daniel Orifice Fitting Co.,* the former employee, Whalen, had been employed to review and develop new products and improvements to existing products. Whalen concealed from his former employer certain findings because he intended to use them later to compete with the employer.

The Court of Appeal observed that Whalen was paid to accomplish a certain task and that once the task was accomplished, the results of his efforts were the property

of the employer.[1] The court found that the trade secrets, which consisted of techniques in manufacturing, properly belonged to the employer because their development was within the scope of the employment. 198 Cal. App. 2d at 798, 18 Cal. Rptr. at 665. *See also True v. Garrett Corp.*, 264 Cal. App. 2d 432, 70 Cal. Rptr. 284 (1968).

Labor Code Section 2860 also establishes that an employer is entitled to preserve ownership of trade secrets, including know-how trade secrets developed on the job:

> "Everything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment."

Pursuant to Section 2860 of the Labor Code, a corporate employer may restrain an employee from taking information about the employer's business processes after the termination of employment. This statute applies to an employee who has merely improved the corporate employer's already existing processes or even where the processes the employee seeks to use were developed as a

---

[1] The Court of Appeal rejected Whalen's claim that the developments were made on his own time, stating that: "It is difficult to understand how Whalen could cut his mind off and on at will under the circumstances, i.e. think of things during the lunch hour, for example, which would constitute an improvement to plaintiff's product, and later claim such improvement as his own because he was not working for the company at that particular moment when the thought struck him." 198 Cal. App. 2d at 798, 18 Cal. Rptr. at 666.

result of a specific research project to which the employee had been assigned or on which the employee had been working. *See Nally's Inc. v. Corona Processed Foods, Inc.*, 240 Cal. App. 2d 948, 50 Cal. Rptr. 173 (1966); *Reid v. Mass Co.*, 155 Cal. App. 2d 293, 318 P. 2d 54 (1947); *Alex Foods, Inc. v. Metcalfe*, 137 Cal. App. 2d 415, 290 P. 2d 646 (1955); *California Intelligence Bureau v. Cunningham*, 83 Cal. App. 2d 197, 188 P. 2d 303 (1948).

Flick's participation in the development of the Library as a Weddington employee does not give Flick the right to use the Library to compete with Weddington and solicit Weddington's customers. Flick has violated the Uniform Trade Secrets Act and his fiduciary duties to Weddington by misappropriating the Library, soliciting Weddington's customers, and providing Sound Production services to Weddington's customers.

IV. CONCLUSION

Flick and Creative Cafe have engineered a predatory scheme with the objective of destroying Weddington. They have stolen Weddington's Library and money, and solicited Weddington's customers. Weddington has already sustained several hundred thousand dollars in damage as a result of the conduct of Flick and Creative Cafe. Numerous customers that patronized Weddington prior to the unlawful conduct of Flick and Creative Cafe are now patronizing Flick and Creative Cafe. The only conceivable way to protect the legitimate interests of Weddington during the pendency of this litigation is for this Court to issue a preliminary injunction against Flick

and Creative Cafe, precluding them for utilizing the misappropriated Library, enjoining them from soliciting or providing sound production services to Weddington's customers, and requiring them to deliver to Weddington the Library.

DATED: December 12, 1995

TOM LALLAS
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A Partnership Including
Professional Corporations

By _____
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

WEDDINGTON PRODUCTIONS, INC., a California corporation, Plaintiff, vs. STEPHEN FLICK, an individual, STEVE FLICK'S CREATIVE CAFE, a purported corporation, DEAN BEVILLE, an individual; and DOES 1 through 75, Defendants.	CASE NO. BC140705 MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATIONS OF STEPHEN FLICK, CECILIA HALL, GARY BELL, AND RICHARD SCHNEIDER IN OPPOSITION TO THE MOTION FOR PRELIMINARY INJUNCTION DATE: January 29, 1996 TIME: 9:30 a.m. DEPT: 85

COMES NOW DEFENDANTS STEPHEN FLICK, STEVE FLICK's CREATIVE CAFE AND DEAN BEVILLE AND IN OPPOSITION TO THE MOTION OF PLAINTIFF, WEDDINGTON PRODUCTIONS, INC., FOR PRELIMINARY INJUNCTION SUBMITS THE FOLLOWING:

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I

INTRODUCTION

The facts here are simple. They are not the elaborate web of unsupported allegations and outright lies submitted by the plaintiff, Weddington Productions, Inc. ("Weddington"). Defendant Stephen Flick ("Flick") is a sound effects editor and that is essentially all he knows how to do. He does it well, as evidenced by his two Academy Awards. Weddington is attempting to restrain Flick from practicing his trade, although no evidence of any kind has been presented that Flick is using any of Weddington's assets or engaging in any other form of unfair competition. *Weddington is also seeking an injunction against Steve Flick's Creative Cafe ("Creative Cafe") and Dean Beville ("Beville") without any showing whatsoever that there is any cause of action against those parties upon which injunctive relief can issue.*

Flick met Richard Anderson ("Anderson") at USC Film School 23 years ago and helped Mark Mangini ("Mangini") when Paramount was thinking of firing him in the late 1970's by bringing him in and training him to work with Flick and Anderson as an independent sound effects editor. Weddington was not formed until 1987. Significantly prior to 1987, Flick and Anderson developed the Anderson-Flick Stereo Library. This evolved into the

personal Sound Effects Library. Prior to Weddington's incorporation in 1987, the parties worked on such movies as "Poltergeist," "48 Hours," "Under Fire," "Streets of Fire," "Body Double," "Star Trek-The Motion Picture," and "Robocop." All sound effects developed for these movies were the personal property of Flick, Flick and Anderson, or Flick, Anderson and Mangini and became part of the Anderson-Flick Sound Effects Library. Flick, Mangini and Anderson have operated at various times under their personal names, and as "Screaming Lizard Productions," "Thundertracks, Ltd." and "Weddington Productions," using these corporate entities as a convenience only, and have consistently been in competition with each other for jobs in the industry. The minutes of Weddington from 1987, which have governed the taking of draws from the corporation, provide that draws for each individual are based upon the amount of income production generated by each individual.

Flick entered into a Sound Effects Library Agreement (the "Library Agreement") with Weddington for the purpose of compromising a broader dispute among the parties. The Library Agreement gives Flick the full right, power and authority to use the Sound Effects Library in his separate business. The Library Agreement was prepared by Richard Morganstern ("Morganstern"), counsel for Weddington for many years, at the direction of Mangini, Anderson and Flick.

Neither Screaming Lizard, Thundertracks, nor Weddington have owned or have ever listed the Sound Effects Library as an asset on any financial statement, loan document, minutes, or acquisition documents. Weddington acquired substantially all of its assets from Screaming

Lizard and Thundertracks in 1987. The document transferring assets from Screaming Lizard and Thundertracks excludes the Sound Effects Library, since the Sound Effects Library has always been a personal asset and tool of trade of the individuals. Flick was advised by Weddington's corporate counsel that the Sound Effects Library was an individual asset.

Flick found the environment at Weddington unsatisfactory since Mangini and Anderson were apparently pursuing other careers. Flick gave notice to Mangini and Anderson that he was quitting as an employee, officer and director of Weddington and forming his own sound effects editing business. There was no objection to this action, and no document or letter exists which sets forth any objection to Flick's departure.

II

THE FABLE

The lawsuit and the Declarations filed by Weddington are a fable. They are a thinly disguised attempt to prevent Flick from rightfully performing his trade. No agreement exists to prevent Flick from practicing his trade, using the Sound Effects Library, or from earning a living. Either the Sound Effects Library belongs to Flick, Mangini and Anderson, in which case Flick can use it, or it is subject to the Library Agreement and Flick can use it. Weddington cannot have it both ways.

Flick has taken nothing that belongs to Weddington. There is a limited universe of users for sound effects services, and due to his reputation in the industry and his

two Academy Awards, Flick has attracted many offers to provide such services. Mangini and Anderson have insisted that Weddington has no goodwill, so there is nothing that Flick could take from Weddington.

There are at least four copies of the Sound Effects Library. Mangini and Anderson have at least three copies of the Library, and retain control of such copies for Weddington's use if they want. Flick has not prevented Mangini, Anderson or Weddington from utilizing the Sound Effects Library in any manner or from competing in the sound effects editing business.

That gets us to the Library Agreement. It is not often that we have encountered such blatant perjury as found in the Declarations of Mangini and Anderson. Mangini, Anderson and Flick directed Morganstern, Weddington's counsel for over eight years, to prepare a Library Agreement on January 4, 1995. Morganstern prepared the Agreement and forwarded it to Mangini, Anderson and Flick on February 14, 1995. In spite of this fact, Mangini and Anderson have perjured themselves, and stated under penalty of perjury that the Library Agreement was prepared by Richard Schneider, Flick's personal counsel. Weddington's counsel Morganstern was present at the January 4, 1995 meeting at which he was directed to prepare the Library Agreement by Mangini, Anderson and Flick. Morganstern prepared the Agreement. Morganstern sent a letter to Mangini, Anderson and Flick telling them he had prepared the Agreement and including the Library Agreement with his letter. The Library Agreement was signed on behalf of Weddington and adopted at a Weddington board meeting on April 10, 1995

at which all Weddington Directors were present. It is a binding obligation of Weddington.

III

FLICK HAS AN ABSOLUTE RIGHT TO USE THE SOUND LIBRARY BY VIRTUE OF THE SOUND EFFECTS LIBRARY AGREEMENT

Flick entered into a valid and binding written agreement with Weddington for his use of the Sound Effects Library. The Library Agreement specifically provides for the use of the Sound Effects Library by Flick:

> "In the event that either Anderson, Flick or Mangini terminates employment with Weddington (whether such termination is voluntary or involuntary), the following shall occur:
>
> a. The terminated party shall have a royalty free, fully paid up right and license to utilize the Library as it exists as of the effective date of termination in connection with the rendering of post production sound effects editing services to others provided that such services are rendered by the terminated party.
>
> b. To facilitate the above, Weddington shall provide the terminated party with one copy of the Library as it exists as of the date of termination."

The Board of Directors of Weddington approved the Library Agreement at a duly attended meeting of the Board of Directors at which Mangini, Anderson and Flick, all of Weddington's directors, were present. A majority of the Board signed the Board resolution approving the Library Agreement. As the Board acts properly through a

majority, the Library Agreement was thus made binding upon Weddington.

Anderson's argument that the Library Agreement is not valid because he did not intend it to be valid until a "global" agreement was reached among the parties is absurd. The secret intentions of a party to a contract *never* determine a contract's effectiveness. Anderson's assertions violate not only basic contract law, but the parol evidence rule and the best evidence rule:

> "Defendants contend, however, that a 'different intention' (*Civil Code* Section 1739) has been made to appear by its affidavit. In making this contention, however, it overlooks the parol evidence rule (*Civil Code* Section 1625; *Code of Civil Procedure* Section 1856 . . . [Citation.] . . .
>
> " 'The rule that prior contemporaneous negotiations cannot be used to contradict, add to, or vary a written contract applies not only to the letter of the written agreement, but also applies to its legal effect.' " [Citations]."

The court went on further:

> "Since these documents are not 'reasonably susceptible of the meaning contended for by [Appellants] [Citations] Thaler's Declaration of his intention is not' even under the recently liberalized parol evidence rule . . . evidence competent to contradict the express terms of these instruments."

Exchequer Acceptance Corporation v. Alexander (1969) 271 Cal.App.2d 1; 72 Cal.Rptr. 328 (See also *Banco Do Brasil, S.A. v. Latian, Inc.* (1991) 234 Cal.App.3d 1053; 285 Cal.Rptr. 870)

Anderson's statement of his "intention" with regard to the agreement therefore is not relevant. Anderson's statement of his intentions is directly contradictory to the terms of the written agreement between the parties and is thus inadmissible, as a matter of law, as it violates the parol evidence rule.

IV

THE SOUND LIBRARY WAS AN ASSET OF THE INDIVIDUALS

Assuming *arguendo* that Weddington's position is correct in that the Library Agreement executed among Anderson, Mangini, and Flick is not valid, then Flick has an absolute right to use the Sound Library. The Sound Library is not an asset of Weddington, it is an asset of the individuals, Mangini, Anderson and Flick. A significant part of the Sound Effects Library was created prior to the incorporation of Weddington, and sound effects added after Weddington's incorporation were the property of Flick, Mangini and Anderson.

Individual sound editors maintain a possessionary interest in the sound effects which they use in a particular project. If that were not the case, sound editors would not be able to practice their trade. The custom in a particular industry binds those within that industry:

> "The prevailing industry custom binds those engaged in the business even though there is no specific proof that the particular party to the litigation knew of the custom. (*Peskin v. Squires* (1957) 156 Cal.App.2d 240, 248; 319 P.2d 405.)"

Midwest Television, Inc. v. Scott, Lancaster, Mills & Atha, Inc. (1988) 205 Cal.App.3d 442, 452; 252 Cal.Rptr. 573

V

THERE IS NO COMPETENT EVIDENCE BEFORE THIS COURT UPON WHICH THE RELIEF SOUGHT BY THE PLAINTIFF CAN BE GRANTED

As more fully set forth in the Objections to Evidence filed separately herewith, there is absolutely no competent evidence before this Court upon which the relief sought by Weddington can be granted against any of the defendants, Flick, Creative Cafe, or Beville. The Court will note that the *original* Motion for Preliminary Injunction is based on the oral testimony in the Declarations of Mangini and Anderson with no documentation to support any of their statements. The statements set forth in the original Declarations of Mangini and Anderson are contradicted by the documents proffered to this court by Flick.

The additional, conclusionary Declarations filed in the Reply Memorandum add nothing to Weddington's Motion. They merely add to the string of conclusions made, without any basis in fact, and without any documentation to support them. The additional documents contain no evidence which establishes the case in chief of Weddington against Flick, Creative Cafe, or Beville.

The Complaint is verified by an officer of the corporation and therefore cannot be considered as evidence at the hearing on this Motion for Preliminary Injunction.

VI

FLICK EFFECTIVELY RESIGNED AS AN OFFICER AND DIRECTOR OF WEDDINGTON AND HAS NO FIDUCIARY DUTY TO WEDDINGTON

In July, 1995, Flick left the employment of Weddington, with the full knowledge and consent of Mangini, Anderson and Weddington. Flick resigned as a member of the Board of Directors and as a corporate officer by notifying Mangini and Anderson that he was removing himself from Weddington in all capacities. Flick has not received any notice of any directors or shareholders meetings since, nor was Flick consulted or notified or his vote sought when Weddington paid Anderson $155,826.60, or when Weddington hired Tom Lallas to sue him. After Flick's departure, the locks at the offices of Weddington were changed and initially mail and telephone calls were not forwarded by Weddington to Flick. Weddington ratified Flick's departure.

Mangini, Anderson and Weddington were all aware, at all times, that Flick had resigned as a [sic] officer and director and was no longer a fiduciary of Weddington in any capacity. Mangini, Anderson and Weddington were also aware, at all times, that Flick was a sound effects editor and that Flick would engage in his trade and business after leaving the employ of Weddington and use his Sound Effects Library. That has been the policy of Weddington, and constitutes his understanding with Mangini and Anderson from the beginning of their relationship in the 1970's. Mangini and Anderson themselves have engaged in employment outside the scope of Weddington while employed at Weddington. At the time that

Flick left Weddington, Flick specifically informed Mangini and Anderson that Flick was going to go into business for himself to engage in a business apart from Weddington.

Since leaving Weddington, Flick has been competing with Weddington only in the sense that any sound effects editor competes with any other sound effects editor. Within Weddington itself, Mangini, Anderson and Flick contemplated this competitive environment in the Weddington Minutes, basing their compensation upon the income and jobs that they personally obtained for themselves solely on the basis of their personal reputations. In effect, they competed for jobs within Weddington and simply used Weddington as a convenient means to conduct their administrative business.

As Flick only owns one-third of the outstanding shares of Weddington, and is not an officer or director of Weddington, he does not have any fiduciary obligations to Weddington.

VII

FLICK CANNOT BE BARRED FROM PRACTICING HIS PROFESSION

Section 16600 of the *Business and Professions Code* holds that:

> "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."

Exceptions to this rule are found in Section 16601 of the *Business and Professions Code* where the sale of a business, its goodwill or shares exempt a person from Section 16600 of the *Business and Professions Code*. In *Golden State Linen Service, Inc. v. Vidalin* (1977) 69 Cal. App. 3d 1; 137 Cal. Rptr. 807, Section 16601 was held to only exempt persons who actually sold the business itself. Flick has not sold his shares of Weddington. As Mangini and Anderson have stated themselves, no buy-out agreement has been entered into between the parties. No agreement regarding a covenant not to compete was entered into by Flick, Weddington, Anderson and Mangini. Flick is therefore not barred from the practice of his trade under *Business and Professions Code* 16600.

In *Levine v. E.A. Johnson & Co.* (1951) 107 Cal. App. 2d 322; 237 P. 2d 309, the Court of Appeal held that former employees could not be barred by injunction from the right to pursue a gainful and lawful occupation in their field. The Court noted:

> "To grant the relief prayed for by appellants would virtually operate to deprive respondents of their right to pursue a gainful and lawful occupation in the field for which they are equipped by virtue of Eskil Johnson's almost half century of service in his field. This, equity cannot do. Every person is as free to pursue any calling he may choose as to possess any property he owns."

Flick has engaged in the trade of sound editing for 20 years. His vast experiences as a sound editor have won him two Academy Awards and numerous nominations.

In *Rigging Intern. Maintenance Co. v. Gwin* (1982) 128 Cal.App.3d 594; 180 Cal. Rptr. 451, the court held that:

> "An employee's skill and knowledge of a particular business constitute the means by which he earns a living, and the courts should not hastily brand them as confidential where this will deprive him of employment opportunities [citations]."

Flick may conduct business in competition with Weddington as the customer base is not a trade secret. In *Fortna v. Martin* (1958) 158 Cal.App. 2d 634; 323 P. 2d 146, the court held that:

> "Whether or not equity will enjoin a former employee form using information acquired while in such employ to the disadvantage of the former employer depends on whether or not in a given case the information gained is secret and confidential. If it is, a former employee may not use it, but if it is not, a former employee may do so. [citations]."

The question of whether or not Flick may engage in business with clients of Weddington depends on whether or not the client list of Weddington is secret and confidential. In *Aetna Bldg. Maintenance Co. v. West* (1952) 39 Cal. 2d 198; 246 P. 2d 11, the court held that matters which were of public or general knowledge in an industry cannot be appropriated as a trade secret. There are only a limited number of companies that request sound effect systems. Customers within this industry are therefore generally known to all who practice trade within the sound effects industry. Weddington cannot claim the entire industry as its clients. Flick cannot therefore be enjoined from doing business with these entities. In *Abba*

Rubber Co. v. Seaquist (1991) 235 Cal.App. 3d 1; 286 Cal.Rptr. 518, the court held that for a customer list to be considered a trade secret, it is necessary to establish that the list is of considerable value and that such list was secret. The court held that:

> "[U]nder California law, information can be a trade secret even though it is readily ascertainable, so long as it has *not yet been ascertained* by others in the industry."

The client list of Weddington is not a secret client list whose identities are yet to be ascertained. All who practice within the sound effects industry know who potential clients are. Flick is therefore entitled to engage in the business of sound effects productions and may conduct business with an already ascertained, generally known clientele.

VIII

THE BALANCE OF EQUITY IS IN FAVOR OF FLICK, CREATIVE CAFE AND BEVILLE

In each instance in which an application for injunctive relief is sought, the Court must balance the equities between the plaintiff and the defendant. The balancing of equities allows for the Court to grant relief only if the plaintiff will be injured to a greater extent than the defendant. There are no equities in favor of Weddington and thus this Court does not even have to do a balance. Mangini and Anderson still have three copies of the Sound Effects Library which Weddington can use. If the injunction issues, as requested by Weddington, Flick will be precluded from earning a livelihood. His sole means of

support is by his work as a sound editor, with his Sound Effects Library, and the injunction requested by Weddington would preclude Flick from earning a living. Weddington has cited *Robin v. Superior Court*, (1985) 38 Cal.3d 199, 211 Cal.Rptr. 398, at Page 205, to the effect that "If the denial of an injunction would result in great harm to the plaintiff, and the defendant would suffer little harm if it were granted, then it is an abusive discretion to fail to grant the preliminary injunction." In the present case, Flick would suffer great harm, and Weddington would suffer no harm. Weddington would continue to be able to operate in its normal course of business as it operated prior to the time that Flick left the employment of Weddington. Weddington could use the copies of the Sound Effects Library which remain in the possession of Mangini and Anderson. Flick would be deprived of his livelihood.

IX

THE PLAINTIFF HAS AN ADEQUATE REMEDY AT LAW

An injunction is improper if it seeks repossession of personal property. There is absolutely no dispute whatsoever with regard to the ownership and use of the Sound Library. Even if such a dispute did exist, the resolution of that dispute, through the injunctive relief requested, and through the dispossession of the Sound Library and return to Weddington, is not a proper purpose for injunctive relief. In *Voorhies v. Green*, (1983) 139 Cal.App.3d 992; 189 Cal.Rptr. 132, plaintiff sought an injunction to obtain possessionary use of client files in

connection with a dispute with his former law firm. The court noted at Page 999 as follows:

> " . . . an injunction should not issue to transfer possession of real or personal property held under an ostensibly extant contract . . . "

Weddington has cited *West Coast Construction Co., Inc. v. The Oceano Sanitary District*, (1971) 17 Cal.App.3d 693, 700, 95 Cal.Rptr. 169, *Duvall v. White*, (1920) 46 Cal.App.3d 305, 308, and several other cases for the proposition that the insolvency of a defendant may be a matter for the court's consideration in deciding whether or not to issue an injunction. Weddington thereafter makes the statement that Flick does not have sufficient assets to respond in damages to Weddington. There is absolutely no support for this proposition, and in fact this proposition flies in the face of Weddington's allegation that Flick has funds which he received from Weddington. Flick has a home, bank accounts and other assets which Weddington is attempting to attach in a separate action. Weddington must therefore think that there is equity in such assets.

X

THE PLAINTIFF HAS NOT SHOWN THAT IT WILL SUCCEED IN ITS LAWSUIT

As noted above, the entire Motion for Preliminary Injunction is a fraud on this Court. The defendant, Flick, has an absolute right to use the Sound Effects Library. There is no evidence before Court to support an injunction against Creative Cafe and Beville. In order for the preliminary injunction to issue in favor of Weddington,

Weddington must show that it will succeed in the lawsuit. Weddington has not come anywhere near showing that. Weddington has proffered no competent evidence, and indeed the purported evidence that the Weddington has offered to this Court is a sham and an attempt to defraud this Court.

XI

CONCLUSION

For each and all of the foregoing reasons, it is respectfully requested that the Motion of Weddington, for Preliminary Injunction, be denied as to each of the defendants, Flick, Creative Cafe, and Beville.

Dated: January 19, 1996

/s/ Robert L. Becking
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

WEDDINGTON PRODUCTIONS, INC., a California Corporation, Plaintiff, v. STEPHEN FLICK, an individual, STEVE FLICK'S CREATIVE CAFE, a purported corporation, DEAN BEVILLE, an individual; and DOES 1 through 75, Inclusive, Defendants.	CASE NO. BC 140 705 SUPPLEMENTAL REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION Date: January 29, 1996 Time: 9:30 a.m. Dept: 85 (Filed Jan. 25, 1996)

I.

INTRODUCTION

In this Supplemental Reply Memorandum in Support of Motion for Preliminary Injunction (the "Supplement"), Weddington applies controlling California law to the

facts of this case with respect to the Sound Library owned by Weddington. Specifically, as set forth below:

(a) As a director, officer and shareholder of Weddington, Flick owed Weddington a fiduciary duty, and breached that duty by, among other things, converting Weddington's funds, competing unlawfully with Weddington, creating the Sound Library Agreement without providing consideration to Weddington in return, and misappropriating Weddington's Sound Library; and

(b) Pursuant to the Corporate Opportunity Doctrine, officers, directors and shareholders are not entitled to seize the corporation's business opportunities, and Flick has done so by the acts describe above.

II.

FLICK OWED WEDDINGTON FIDUCIARY DUTIES AND BREACHED THOSE FIDUCIARY DUTIES

A. Flick Owes Weddington A Fiduciary Duty.

Both directors and officers of a corporation stand in a fiduciary relationship and owe fiduciary duties to the corporation, corporate employees and shareholders. *General Advertising Agency Inc. v. Komer*, 251 Cal. App. 2d 805, 60 Cal. Rptr. 10, 12 (1967) (directors); *Lewis v. Lebaron*, 254 Cal. App. 2d 270, 61 Cal. Rptr. 903, 911 (1967) (officers).

In *Mueller v. MacBann*, 62 Cal. App. 3d 258, 132 Cal. Rptr. 222, 229, 230 (1976), the Court of Appeal stated that:

> if any contract or engagement between a corporation and one of its directors or controlling shareholders is challenged, the burden is on the

> director or shareholder to show its inherent fairness from the viewpoint of the corporation. Directors and shareholders cannot "give away or appropriate to themselves" any corporate assets.

Thus, if a director or shareholder has caused a corporation to give up a corporate asset, such director or shareholder has the burden of establishing that the corporation received fair consideration in exchange, i.e., that the director or shareholder did not give away the corporate asset.

B. Flick Has Breached Fiduciary Duties He Owes Weddington.

Flick has never submitted a written resignation as an officer or director of Weddington and is still an officer and a member of the Board of Directors of Weddington. [MM, ¶ 27] Flick is now providing sound production services in direct competition with Weddington for his new corporation, Creative Cafe, by using the Sound Library.

Further, by using the Sound Library, Flick is injuring Weddington, depriving it of profits. Flick's contention that his new corporation is entitled to use the Sound Library based upon the Proposed Library Agreement, which would place ownership of the Sound Library in an entity other than Weddington, is erroneous. Not only is the Proposed Library Agreement ineffective for the reasons set forth in Weddington's Reply Memorandum in Support of its Application for a Preliminary Injunction, but pursuant to the Proposed Library Agreement, Flick

purportedly has caused Weddington to give up its rights to the Sound Library *without receiving any consideration in exchange*. Pursuant to the controlling California authority discussed above, this conduct constitutes a breach by Flick of his fiduciary duties to Weddington.

III.

FLICK HAS VIOLATED THE CORPORATE OPPORTUNITY DOCTRINE BY MISAPPROPRIATING WEDDINGTON'S MOST VALUABLE TRADE SECRET, THE SOUND LIBRARY

A. The Corporate Opportunity Doctrine In California.

"It is well settled that a director or officer of a corporation may not enter into a competing enterprise which cripples or injures the business of the corporation of which he is an officer or director." *Xum Speegle Inc. v. Fields*, 216 Cal. App. 2d 546, 31 Cal. Rptr. 1014, 106-107 (1963). "An officer or a director may not seize for himself, to the detriment of his company, business opportunities in the company's line of activities which his company has an interest and prior claim to obtain. In the event that he does seize such opportunities in violation of his fiduciary duty, the corporation may claim for itself all benefits so obtained." 31 Cal. Rptr. at 107.

B. Flick Has Violated The Corporate Opportunity Doctrine.

In addition to competing unlawfully with Weddington by soliciting Weddington's customers, Flick has violated the corporate opportunity doctrine by seizing for

the benefit of his own corporation Weddington's most valuable trade secret, i.e., its Sound Library. As set forth in detail in Section II.(A) of Weddington's Reply in Support of its Application for a Preliminary Injunction, Weddington owns the Sound Library. Flick's theft and use of the Sound Library of Weddington constitutes the seizure by Flick's corporation, Creative Cafe, of Weddington's assets, i.e., the Sound Library, to the detriment of Weddington. Since Flick has seized such corporate opportunities in violation of his fiduciary duty, Weddington may claim for itself all benefits so obtained.

IV.

CONCLUSION

Under controlling California law, a director, officer or controlling shareholder of a corporation owes fiduciary duties to a corporation, and, under the corporate opportunity doctrine, may not appropriate corporate opportunities for his own benefit. As set forth above, Flick, an officer, director and one-third shareholder of Weddington, breached his fiduciary duties to Weddington, and misappropriated Weddington's corporate opportunities, by, among other things, using the Sound Library for his own benefit. For these reasons, and the reasons set forth in all of Weddington's papers in support of its Application for a Preliminary Injunction, this Court should grant Weddington's Application for a Preliminary Injunction.

DATED:
January 25, 1996

TOM LALLAS
THEODORE A. COHEN
LEVY, SMALL & LALLAS
A Partnership Including
Professional Corporations

By /s/ Theodore A. Cohen
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

WEDDINGTON PRODUCTIONS, INC., a California corporation, Plaintiff, vs. STEPHEN FLICK, an individual, STEVE FLICK'S CREATIVE CAFE, a purported corporation, DEAN BEVILLE, an individual; and DOES 1 through 75, Defendants.	CASE NO. BC140705 NOTICE OF APPEAL (Filed Feb. 2, 1996)

Defendants and Appellants Stephen Flick, Steve Flick's Creative Cafe, and Dean Beville appeal to the Court of Appeal of the State of California, Second Appellate District, from the Order granting plaintiff's Motion for a Preliminary Injunction entered on January 29, 1996, in Department 85 of the above-entitled court.

Dated:
February 1, 1996

/s/ Robert L. Becking
ROBERT L. BECKING
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

(Filed Feb. 23, 1996)

STEPHEN HUNTER FLICK, Plaintiff, vs. WEDDINGTON PRODUCTIONS, INC., a California corporation; MARK MANGINI; RICHARD LOUIS ANDERSON; and DOES 1 through 50, inclusive, Defendants.	CASE NO. BC144934 COMPLAINT FOR: (1) INVOLUNTARY DISSOLUTION OF A CORPORATION; (2) BREACH OF FIDUCIARY DUTIES; (3) FRAUD; (4) INJUNCTION; (5) UNTRUE OR MISLEADING ADVERTISING; (6) UNFAIR COMPETITION; (7) BREACH OF WRITTEN CONTRACT; (8) SPECIFIC PERFORMANCE; (9) CONVERSION; (10) BREACH OF ORAL CONTRACT;

) (11) MONEY LENT;
) (12) MONEY HAD AND
) RECEIVED;
) (13) WRONGFUL
) INTERFERENCE
) WITH PROSPECTIVE
) ECONOMIC
) ADVANTAGE;
) (14) CONSPIRACY TO
) WRONGFULLY
) INTERFERE WITH
) AN ECONOMIC
) ADVANTAGE; and
) (15) ACCOUNTING.

Plaintiff Stephen Hunter Flick ("plaintiff") for his causes of action, alleges as follows:

FIRST CAUSE OF ACTION

(For Involuntary Dissolution of Corporation Against All Defendants)

1. Plaintiff is an individual residing in the County of Los Angeles, State of California.

2. Defendant Weddington Productions, Inc. ("defendant Weddington") is a corporation organized and existing under the laws of the State of California, and maintains its principal office in Los Angeles County, California.

3. Plaintiff is informed and believes and based thereon alleges that defendants Richard Louis Anderson ("defendant Anderson") and Mark Mangini ("defendant Mangini") are individuals who reside in Los Angeles County, State of California.

4. Defendant Weddington is not subject to the Banking Law, Public Utilities Act, Savings and Loan Association Law, or Sections 1010-1062 of the California Insurance Code.

5. The true names and capacities, whether individual, corporate, associate, or otherwise of defendants named herein as Does 1 through 50, inclusive, are unknown to plaintiff who, therefore, sues said defendants by such fictitious names. Plaintiff will amend this complaint to show such true names and capacities when he has ascertained the same.

6. Plaintiff is informed and believes and based thereon alleges that in doing the acts alleged below, defendants were the agents, servants, and employees of each other, and were acting in the scope of their authority as agents, servants, and employees, and with the permission of each other, and that each defendant is legally responsible in some manner for the damages that plaintiff has suffered.

7. Defendant Mangini is now, and at all times material hereto has been, an officer and director of defendant Weddington.

8. Defendant Anderson is now, and at all times material hereto has been, an officer and director of defendant Weddington.

9. Plaintiff owns 200 shares of the stock of defendant Weddington. Plaintiff's shares of defendant Weddington represent not less than 33-1/3% of the total number of outstanding common shares of defendant Weddington.

10. The total number of shares of defendant Weddington common stock outstanding is 600.

11. Defendant Weddington has three shareholders, plaintiff and defendants Anderson and Mangini, and liquidation is reasonably necessary for the protection of the rights and interests of plaintiff shareholder in that:

(a) There is internal dissension and two or more factions of shareholders in defendant Weddington are so deadlocked that its business can no longer be conducted with advantage to its shareholders;

(b) Defendants Mangini and Anderson have been guilty of or have knowingly countenanced persistent and pervasive fraud, mismanagement and/or abusive authority and/or persistent unfairness toward plaintiff; and

(c) The property of defendant Weddington is being misapplied and wasted by defendants Mangini and Anderson.

SECOND CAUSE OF ACTION

(For Breach of Fiduciary Duties Against Defendants Mangini, Anderson, and Does 1 through 20, inclusive)

12. Plaintiff realleges paragraphs 1 through 10 of this Complaint.

13. By reason of the foregoing, defendants Mangini and Anderson now owe, and at all times material hereto have owed, fiduciary duties to plaintiff.

14. Plaintiff is informed and believes and based thereon alleges that on or about September 25, 1995,

without the prior knowledge, consent or approval of plaintiff, defendant Weddington or its Board of Directors, defendant Mangini authorized defendant Anderson to write two checks to defendant Anderson, in the amounts of $57,771.57 and $98,055.03, respectively, drawn against defendant Weddington's bank account. Thereafter, defendant Anderson negotiated these two checks, and in doing so, received proceeds that belonged to defendant Weddington in the amount of $155,826.60. The withdrawal of such sums depleted defendant Weddington's funds, and caused defendant Weddington damages. In addition, such sums were withdrawn without a directors' meeting, shareholders' meeting, or other authority.

15. Plaintiff is informed and believes and based thereon alleges that on or about September 11, 1995, without the prior knowledge, consent or approval of plaintiff, defendant Weddington or its Board of Directors, defendant Mangini caused defendant Weddington to write defendant Mangini a check in the amount of $7,000.00 drawn against defendant Weddington's bank account. Thereafter, defendant Mangini negotiated this check, and in doing so, received proceeds that belonged to defendant Weddington in the amount of $7,000.00. The withdrawal of such sum depleted defendant Weddington's funds, and caused defendant Weddington damages. In addition, such sum was withdrawn without a directors' meeting, shareholders' meeting, or other authority.

16. In doing the acts and things hereinabove alleged, defendants Mangini and Anderson have breached the fiduciary duties they owe to plaintiff.

17. As a proximate result of the breach of fiduciary duties by defendants Mangini and Anderson as herein alleged, plaintiff was denied compensation to which he was otherwise entitled, because defendants Anderson and Mangini prevented defendant Weddington from being able to pay such compensation to plaintiff.

18. By reason of defendant Mangini's and defendant Anderson's breach of fiduciary duties, plaintiff has been damaged in an amount not yet ascertained, but in an amount in excess of $25,000.00, together with interest thereon at the legal rate. Plaintiff will seek leave of Court to amend this Complaint to set forth the amount of said damages when they have been ascertained or upon proof at the time of trial.

19. In doing the acts and things hereinabove alleged, defendants Mangini and Anderson were guilty of malice and oppression and done with the intention on the part of said defendants of causing damage to plaintiff, so as to justify an amount of exemplary and punitive damages.

THIRD CAUSE OF ACTION

(For Breach of Fiduciary Duty Against Defendants Mangini and Does 1 through 20, inclusive)

20. Plaintiff realleges paragraphs 1 through 10 of this Complaint.

21. By reason of the foregoing, defendant Mangini owed a fiduciary duty to plaintiff.

22. Plaintiff is informed and believes and based thereon alleges that in or about 1994 defendants Mangini

and Does 1 through 20, inclusive, entered into a partnership called "Phoenix Systems" to compete with defendant Weddington.

23. Phoenix Systems did in fact compete with defendant Weddington in renting sound editing equipment in competition with defendant Weddington's business during the period of time that defendant Mangini was an officer and director of defendant Weddington.

24. Defendant Mangini failed to disclose to defendant Weddington or to its officers or directors, including plaintiff, that defendant Mangini had an equity interest in Phoenix Systems and was engaging in competition with defendant Weddington without the knowledge of plaintiff.

25. According to defendant Weddington's check registers for the months of March through December 1994, and the months of January, April, May, and August 1995, a total of $108,575.00 was paid to Phoenix Systems, Inc. from defendant Weddington accounts.

26. In acting as described above, defendant Mangini did not exercise the care required of directors.

27. As a proximate result of the breach of fiduciary duty by defendant Mangini as herein alleged, plaintiff has suffered damages and was denied compensation to which he was otherwise entitled, because defendant Mangini prevented defendant Weddington from being able to pay such compensation to plaintiff.

28. By reason of defendant Mangini's breach of fiduciary duties as stated above, plaintiff has been damaged in an amount not yet ascertained, but in an amount

in excess of $25,000.00, together with interest thereon at the legal rate. Plaintiff will seek leave of Court to amend this Complaint to set forth the amount of said damages when the same have been ascertained or upon proof at the time of trial.

FOURTH CAUSE OF ACTION

(For Fraud Against Defendant Mangini and Does 1 through 20, inclusive)

29. Plaintiff realleges paragraphs 1 through 10 of this Complaint.

30. By reason of the foregoing, defendant Mangini owed a duty to plaintiff to disclose actions taken by him which are detrimental to the interests of plaintiff as a shareholder and director of defendant Weddington.

31. In or about 1994, defendant Mangini entered into a partnership called "Phoenix Systems" to compete with defendant Weddington.

32. Phoenix Systems did in fact compete with defendant Weddington by renting sound editing equipment in competition with defendant Weddington's business during the period of time that defendant Mangini was an officer and director of defendant Weddington.

33. Defendant Mangini failed to disclose to defendant Weddington or to its officers or directors, including plaintiff, that defendant Mangini had an equity interest in Phoenix Systems and was engaged in competition with defendant Weddington without the knowledge of plaintiff.

34. Defendant Mangini induced plaintiff on behalf of defendant Weddington to pay Phoenix Systems amounts for equipment rental without disclosing to plaintiff defendant Mangini's personal interest in Phoenix Systems.

35. According to defendant Weddington's check registers for the months of March through December 1994, and the months of January, April, May, and August 1995, a total of $108,575.00 was paid to Phoenix Systems, Inc. from defendant Weddington accounts.

36. The representations and failures to disclose information and the suppression of information alleged to have been made by defendant Mangini were made with the intent to induce plaintiff to act in the manner herein alleged in reliance thereon.

37. Plaintiff, at the time these failures to disclose and the suppression of facts occurred and at the time plaintiff took the actions herein alleged, was ignorant of the existence of the facts which defendant Mangini suppressed and failed to disclose and justifiably relied thereon. If plaintiff had been aware of the existence of the facts not disclosed by defendant, plaintiff would not have, as he did, permitted defendant Weddington to pay Phoenix Systems any amounts for the rental of equipment.

38. As a proximate result of the conduct of defendant Mangini as herein alleged, plaintiff has suffered damages and was denied compensation to which he was otherwise entitled, because defendant Mangini prevented defendant Weddington from being able to pay such compensation to plaintiff, all to plaintiff's damage in amount

not yet ascertained, but in excess of $25,000.00. Plaintiff will amend this Complaint to set forth the amount of said damages when they have been ascertained or upon proof at the time of trial.

39. The aforementioned conduct of defendant Mangini was an intentional misrepresentation, deceit, or concealment of a material fact known to said defendant with the intention on the part of said defendant of thereby depriving plaintiff of property or legal rights or otherwise causing injury, and was despicable conduct that subjected plaintiff to a cruel and unjust hardship in conscious disregard of plaintiff's rights, so as to justify an award of exemplary and punitive damages.

FIFTH CAUSE OF ACTION

(For Injunction Against All Defendants)

40. Plaintiff realleges paragraphs 1 through 10 of this Complaint.

41. Plaintiff is informed and believes and based thereon alleges that beginning in or about August 1995, and continuing to the present time, defendants Anderson, Mangini, Weddington, and Does 1 through 50, inclusive, wrongfully and unlawfully represented to customers and potential customers of plaintiff and defendants that defendants had obtained Academy Awards for sound editing for the movies "Speed" and "RoboCop" and had received nominations for Academy Awards for the movies "Total Recall" and "Die Hard." Defendants made these representations in solicitations to customers and potential customers of plaintiff and defendants without disclosing to said customers and potential customers that

defendants did not receive these awards or nominations, but that these awards or nominations were received by plaintiff.

42. Plaintiff is informed and believes and based thereon alleges that beginning in or about August 1995, and continuing to the present time, defendants wrongfully and unlawfully represented to customers and potential customers of plaintiff and defendants that defendants had obtained screen credits and had performed sound editing services for certain motion pictures without disclosing to said customers and potential customers that defendants did not receive these screen credits and did not perform the services for which those screen credits were claimed, but that these services were performed by plaintiff and the credits were received by plaintiff.

43. Defendants' solicitations to customers and potential customers of plaintiff and defendants were untrue or misleading and likely to deceive said customers and potential customers in that said solicitations wrongfully represent that defendants obtained the screen credits and awards which were received by plaintiff for services performed by plaintiff.

44. In making and disseminating said solicitations herein alleged, defendants knew, or by the exercise of reasonable care should have known, that the statements regarding the screen credits and awards which belong to plaintiff were untrue or misleading.

45. Plaintiff has made demand upon defendants that they stop the conduct alleged herein. However, defendants have failed to do so and continue to make

such representations to customers and potential customers of plaintiff and defendants.

46. Defendants threaten to, and unless restrained will continue to, include in their solicitations for business the credits which belong to plaintiff.

47. Defendants' wrongful conduct, unless and until enjoined and restrained by order of this Court, will cause great and irreparable injury to plaintiff in that plaintiff's customers and potential customers have been and may be confused by the inclusion of plaintiff's awards, nominations and screen credits in the written resumes and solicitations made by defendants, which has or may result in a loss of business to plaintiff.

48. Plaintiff has no adequate remedy at law for the injuries currently being suffered and that are threatened in that it is impossible for plaintiff to determine the precise amount of damage that he will suffer as a loss of business if defendants' conduct is not restrained.

49. As a proximate result of defendants' wrongful conduct, plaintiff has been damaged in an amount presently unknown to plaintiff, but in an amount in excess of $25,000.00. Plaintiff will be further damaged in like manner so long as defendants' conduct continues. The full amount of this damage is not now known to plaintiff, and plaintiff will amend this Complaint to state this amount when it becomes known to him or upon proof at the time of trial.

50. Plaintiff is informed and believes and thereon alleges that defendants performed the above-mentioned acts for the purpose of injuring plaintiff.

SIXTH CAUSE OF ACTION

(For Untrue or Misleading Advertising Against All Defendants)

51. Plaintiff realleges paragraphs 1 through 10 and paragraphs 41 through 46 of this Complaint.

52. Beginning in or about August 1995, and continuing to the present time, defendants Anderson, Mangini, Weddington, and Does 1 through 50, inclusive, have engaged in advertising to the public, and offering for sale services consisting of sound editing. The advertising consists of brochures, resumes, and similar documents. The advertisements are disseminated to and received by the public in California.

53. Defendants have engaged in the advertising herein alleged with the intent to directly or indirectly perform the services described herein and/or to induce the public to enter into an obligation with defendants relating to the services described herein.

54. Defendants' advertising is untrue or misleading and likely to deceive the public in that the advertising includes Academy Awards, nominations, and screen credits which were in fact not received by or credited to defendants but were received by and credited to plaintiff.

55. In making and disseminating the statements herein alleged, defendants knew, or by the exercise of reasonable care should have known, that the statements were untrue or misleading and so acted in violation of Section 17500 of the Business and Professions Code.

56. Unless restrained by this Court, defendants will continue to engage in untrue and misleading advertising,

as alleged above, in violation of Section 17500 of the California Business and Professions Code, thus tending to render judgment in the instant action ineffectual. Plaintiff has no adequate remedy at law in that defendants will continue to engage in untrue and misleading advertising, as alleged above, in violation of Section 17500 of the Business and Professions Code.

SEVENTH CAUSE OF ACTION

(Unfair Competition Against All Defendants)

57. Plaintiff realleges paragraphs 1 through 10, and 51 through 55 of this Complaint.

58. The advertising of defendants Anderson, Mangini, Weddington, and Does 1 through 20, inclusive, as alleged above, constitutes unfair competition in violation of Section 17200 of the California Business and Professions Code.

EIGHTH CAUSE OF ACTION

(For Breach of Contract Against Defendants Anderson, Mangini, Weddington and and [sic] Does 1 through 50, inclusive)

59. Plaintiff realleges paragraphs 1 through 10 of this Complaint.

60. Plaintiff is now, and at all times material hereto has been, an owner of a sound effects library and computer data base (collectively the "Library") consisting of sound effects created by plaintiff or on plaintiff's behalf or in combination with plaintiff prior to the filing of this lawsuit. The Library is stored on a digital master tape and

other media and various copies of the tape have been made. Plaintiff holds all right, title and interest in and to use of the Library and ownership of the Library. The Library constitutes a proprietary trade secret owned by plaintiff.

61. On or about April 10, 1995, at Los Angeles County, California, plaintiff and defendants Anderson, Mangini, Weddington, and Does 1 through 50, inclusive, entered into a written agreement (the "Agreement") whereby plaintiff and defendants agreed that upon plaintiff's termination of employment with defendant Weddington, plaintiff could continue to use the Library. A true and correct copy of the Agreement is attached hereto as Exhibit "A" and incorporated herein by reference.

62. Plaintiff has performed all conditions, covenants, and promises required by him on his part to be performed in accordance with the terms and conditions of the Agreement.

63. In or about August 1995, defendants breached the Agreement by failing to permit plaintiff to use the Library as required by the terms of the Agreement.

64. As a result of the breach of the Agreement by the defendants, plaintiff has been damaged in a sum that has not yet been ascertained, but in an amount in excess of $25,000.00. Plaintiff will amend this Complaint to state the amount of his damages when they have been ascertained or upon proof at the time of trial.

NINTH CAUSE OF ACTION

(For Specific Performance of Written Contract Against Defendants Weddington, Anderson, Mangini, and Does 1 through 50, inclusive)

65. Plaintiff realleges paragraphs 1 through 10 and paragraphs 52 through 55 of this Complaint.

66. The consideration for the Agreement was fair and reasonable at the time the Agreement was entered and the Agreement is, as to defendants, just and reasonable.

67. Defendants Anderson, Mangini, Weddington, and Does 1 through 50, inclusive, have failed and refused and continue to fail and refuse to perform the conditions of the Agreement on their part in that they have failed to allow plaintiff the use of the Library which is described in the Agreement.

68. For the reasons stated, plaintiff has no adequate legal remedy at law, in that the denial by the defendants of the use of the Library is causing damages which cannot be easily calculable and will be inadequate to compensate plaintiff for the detriment suffered by him.

TENTH CAUSE OF ACTION

(For Injunction Against All Defendants)

69. Plaintiff realleges paragraphs 1 through 10 of this Complaint and paragraphs 60 through 64 of this Complaint.

70. Defendants Anderson, Mangini, Weddington, and Does 1 through 50, inclusive, are wrongfully using

the Library to compete with plaintiff, steal plaintiff's clients, and deprive plaintiff of job opportunities. Defendants are wrongfully using the Library to divert revenue and profits that plaintiff would otherwise receive by the use of the Library. Furthermore, defendants are using the Library to solicit and provide sound production services to clients of plaintiff.

71. By reason of defendants' wrongful conduct as alleged herein, plaintiff has sustained, and unless this Court issues a temporary restraining order, a preliminary injunction, and permanent injunction will continue to sustain, great and irreparable injury in that, among other things:

(a) The Library is proprietary to, and a trade secret of, plaintiff;

(b) A sound production company that is engaged in the sound production business and has access to the Library will be able to compete with plaintiff to the extent it has wrongfully gained access to the Library;

(c) Defendants are wrongfully using the Library to compete with plaintiff, steal plaintiff's clients, deprive plaintiff of job opportunities, and divert to defendants revenue and profits that plaintiff would otherwise receive all to the detriment of plaintiff; and

(d) Plaintiff's business will be impaired if defendants are permitted to continue to wrongfully use the copies of the Library in their possession for the foregoing purposes.

72. Plaintiff has no adequate remedy at law for the injuries that plaintiff will sustain by reason of the conduct of defendants as alleged herein.

73. By reason of the facts alleged herein, plaintiff is entitled to a temporary restraining order, preliminary injunction, and permanent injunction:

(a) Compelling defendants to deliver to plaintiff all copies of the Library in their possession; and

(b) Precluding defendants from soliciting or providing sound production services to all clients of plaintiff.

ELEVENTH CAUSE OF ACTION

(For Conversion Against All Defendants)

74. Plaintiff realleges paragraphs 1 through 10 and paragraph 60 of this Complaint.

75. Plaintiff is now, and at all times material hereto has been, entitled to possession of all copies of the Library, including but not limited to the copies of the Library in the possession of defendants.

76. In doing the acts and things herein above alleged, defendants Anderson, Mangini, Weddington, and Does 1 through 50, inclusive, have wrongfully converted the Library to their own use and benefit, to the detriment of plaintiff.

77. As a result of defendants' conversion, plaintiff has been damaged in a sum that has not yet been ascertained, but is believed to be in an amount in excess of $25,000.00. Plaintiff will amend this Complaint to state

the amount of his damages when they have been ascertained or upon proof at the time of trial.

TWELFTH CAUSE OF ACTION

(For An Injunction to Restrain and Damages for Unfair Competition Against All Defendants)

78. Plaintiff realleges paragraphs 1 through 10 and paragraphs 60 through 63 of this Complaint.

79. Commencing in August 1995 and continuing to the present time, defendants Anderson, Mangini, Weddington, and Does 1 through 50, inclusive, and each of them, knowingly and willfully conspired and have engaged in unfair competition in violation of California Business and Professions Code Section 17200.

80. Plaintiff has no adequate remedy at law for the injuries that plaintiff will sustain by reason of the conduct of the defendants as herein alleged.

81. By reason of the facts herein alleged, plaintiff is entitled to a temporary restraining order, preliminary injunction and permanent injunction:

(a) Compelling defendants to deliver to plaintiff all copies of the Library in their possession; and

(b) Precluding defendants from soliciting or providing sound production services to all clients and potential clients of plaintiff by use of the Library.

82. Additionally, plaintiff is entitled to damages that are ascertainable, but the amount of which are not

yet known by plaintiff. Plaintiff will amend this Complaint to set forth the amount of said damages when they have been ascertained or upon proof at the time of trial.

THIRTEENTH CAUSE OF ACTION

(For An Injunction to Restrain, and Damages For, Violation of Uniform Trade Secrets Act Against All Defendants)

83. Plaintiff realleges paragraphs 1 through 10, paragraphs 60 through 63, and paragraphs 71 through 73 of the Complaint.

84. In doing the acts and things herein alleged, defendants Anderson, Mangini, Weddington, and Does 1 through 50, inclusive, are guilty of having misappropriated and misused trade secrets in violation of the Uniform Trade Secrets Act set forth in Sections 3426 through 3426.10 of the California Civil Code.

85. As a result of the violation of the Uniform Trade Secrets Act, plaintiff has been damaged in a sum yet unknown to him, but believed to be in excess of $25,000.00. Plaintiff will amend this Complaint when the amount of the damages has been ascertained or upon proof at the time of trial.

86. As a result thereof, and in addition to all other relief requested herein and available under the Uniform Trade Secrets Act, plaintiff is entitled to recover attorneys' fees incurred in this action pursuant to Section 3426.4 of the California Civil Code.

FOURTEENTH CAUSE OF ACTION

(For Breach of Oral Contract Against Defendants Weddington and Does 1 through 20, inclusive)

87. Plaintiff realleges paragraphs 1 through 6 of the Complaint.

88. During 1995 plaintiff and defendants Weddington and Does 1 through 20, inclusive, entered into an oral agreement whereby plaintiff agreed to loan said defendants the sum of $15,076.51 and defendants agreed to repay said amount on demand, together with interest thereon at the legal rate.

89. Plaintiff intends this Complaint to serve as demand upon defendants for repayment of said loan.

90. Defendants have breached this oral agreement by failing to repay the sum of $15,076.51, together with accrued interest, to plaintiff.

91. There now remains due, owing, and payable the principal sum of $15,076.51, plus interest thereon at the legal rate until the date of judgment.

92. Plaintiff has performed all conditions precedent required to be performed on his part prior to commencing this action.

FIFTEENTH CAUSE OF ACTION

(For Money Lent Against Defendants Weddington and Does 1 through 20, inclusive)

93. Plaintiff realleges paragraphs 1 through 6 of this Complaint.

94. Within the last two years, defendants Weddington and Does 1 through 20, inclusive, became indebted to plaintiff in the sum of $15,076.51 for money lent to said defendants by plaintiff at defendants' request.

95. The principal amount of $15,076.51 is due and payable but has not been paid, although demand for said payment was made on defendants.

96. Plaintiff is entitled to accrued interest on the unpaid principal balance of $15,076.51 at the legal rate until the date of judgment.

97. There now remains due, owing, and payable the principal sum of $15,076.51, plus accrued interest.

98. Plaintiff has duly performed all conditions precedent required to be performed on his part prior to commencing this action.

SIXTEENTH CAUSE OF ACTION

(For Money Had and Received Against Defendants Weddington and Does 1 through 20, inclusive)

99. Plaintiff realleges paragraphs 1 through 6 of this Complaint.

100. Within the last two years, defendants Weddington and Does 1 through 20, inclusive, became indebted to plaintiff in the sum of $15,076.51 for money had and received by said defendants for the use and benefit of said defendants.

101. Neither the whole nor any part of this sum has been paid, although demand therefor has been made, and there is now due, owing, and payable the principal sum

of $15,076.51, together with interest thereon at the legal rate until the date of judgment.

SEVENTEENTH CAUSE OF ACTION

(For Wrongful Interference with Prospective Economic Advantage Against All Defendants)

102. Plaintiff realleges paragraphs 1 through 10 of this Complaint.

103. At all times material herein, plaintiff has had advantageous economic relationships with its clients and customers with the probability of future economic benefits to plaintiff as a result of those relationships.

104. In or about August 1995, and continuing to the present time, defendants Anderson, Mangini, Weddington, and Does 1 through 50, inclusive, have had knowledge of the those [sic] relationships between plaintiff and his clients and customers, and have committed the foregoing tortious acts with the intent to disrupt said relationships.

105. Defendants have successfully interfered with the [sic] those relationships by soliciting the business of plaintiff's clients and customers which otherwise would have gone to plaintiff.

106. The interference with those relationships by defendants has injured plaintiff's business and goodwill, and plaintiff is entitled to general damages in an amount not yet fully known to him but in an amount believed to be in excess of $25,000.00. Plaintiff will seek leave of Court to amend this Complaint to set forth the amount of

said damages when the same have been ascertained or upon proof at the time of trial.

107. Defendants have committed the foregoing tortious acts with the intention to cause injury to plaintiff. By intentionally and tortiously causing plaintiff damage, defendants have also been guilty of oppression, fraud and/or malice, and therefore plaintiff, pursuant to California Civil Code Section 3294, may recover punitive damages in an amount according to proof at the time of trial for the sake of example and by way of punishing defendants.

EIGHTEENTH CAUSE OF ACTION

(For Conspiracy to Wrongfully Interfere With a Prospective Economic Advantage Against All Defendants)

108. Plaintiff realleges paragraphs 1 through 8, and paragraphs 103 through 106 of this Complaint.

109. In or about August 1995, and continuing until the present time, defendants Anderson, Mangini, Weddington, and Does 1 through 50, inclusive, knowingly and willfully conspired to interfere with the relationships set forth in paragraph 103 above.

110. In furtherance of this conspiracy, defendants committed the tortious acts alleged herein.

111. The conspiracy, and the acts in furtherance of it, caused injury to plaintiff's business and goodwill, and plaintiff is therefore entitled to general damages in an amount not yet fully known to him, but in an amount in excess of $25,000.00. Plaintiff will seek leave of Court to

amend this Complaint to set forth the amount of said damages when the same have been ascertained or upon proof at the time of trial.

112. Defendants conspired, and acted in furtherance of the conspiracy, with the intention to cause injury to plaintiff. By intentionally and tortiously causing plaintiff damage, defendants have been guilty of oppression, fraud and/or malice and therefore plaintiff, pursuant to California Civil Code Section 3294, may recover punitive damages in an amount according to proof at the time of trial for the sake of example and by way of punishing defendants.

NINETEENTH CAUSE OF ACTION

(For An Accounting Against All Defendants)

113. Plaintiff realleges paragraphs 1 through 8 and paragraphs 103 through 106 of this Complaint.

114. By reason of the acts alleged herein, defendants Anderson, Mangini, Weddington, and Does 1 through 50, inclusive, have collected money, the amount of which is not known to plaintiff, that belongs to plaintiff.

115. Plaintiff has demanded that defendants account to plaintiff for the monies collected by defendants as aforesaid but defendants have failed and refused, and continue to fail and refuse, to provide such an accounting.

116. Plaintiff is informed and believes, and based upon such information and belief alleges, that on an accounting by defendants there will be found to be a balance due to plaintiff, by reason of the facts and things

alleged herein, the amount of which is not known to plaintiff.

117. An accounting is necessary to show the amount due to plaintiff from defendants, by reason of the acts and things alleged herein, and the amount due would be shown by such an accounting.

WHEREFORE, plaintiff prays for judgment against defendants as follows:

AS TO THE FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS:

1. That the Court decree a winding up and dissolution of defendant Weddington Productions, Inc.;

2. That the Court entertain such proceedings as may be necessary or proper for the involuntary winding up or dissolution of defendant Weddington Productions, Inc., and, in that regard, make such orders for winding up and dissolution of defendant Weddington Productions, Inc. as justice and equity require;

AS TO THE SECOND CAUSE OF ACTION AGAINST DEFENDANTS MANGINI, ANDERSON, AND DOES 1 THROUGH 20 INCLUSIVE:

3. For damages according to proof, in an amount in excess of $25,000.00, together with interest thereon at the legal rate;

4. For exemplary damages;

AS TO THE THIRD CAUSE OF ACTION AGAINST DEFENDANTS MARK MANGINI AND DOES 1 THROUGH 20 INCLUSIVE:

5. For damages according to proof, in an amount in excess of $25,000.00, together with interest thereon at the legal rate;

6. For exemplary damages;

AS TO THE FOURTH CAUSE OF ACTION AGAINST DEFENDANTS MANGINI AND DOES 1 THROUGH 20 INCLUSIVE:

7. For damages according to proof, in an amount in excess of $25,000.00, together with interest thereon at the legal rate;

8. For exemplary damages;

AS TO THE FIFTH CAUSE OF ACTION AGAINST ALL DEFENDANTS:

9. For an order requiring defendants, and each of them, to show cause, if any they have, why they should not be enjoined as hereinafter set forth, during the pendency of this action;

10. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendants from using plaintiff's motion pictures, awards, nominations, and screen credits in their solicitations for business;

11. For damages according to proof, in an amount in excess of $25,000.00, together with interest thereon at the legal rate;

AS TO THE SIXTH CAUSE OF ACTION AGAINST ALL DEFENDANTS:

12. For an order requiring defendants, and each of them, to show cause, if any they have, why they should not be enjoined as hereinafter set forth, during the pendency of this action;

13. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendants from using plaintiff's motion pictures, awards, nominations, and screen credits in their solicitations for business;

14. For damages according to proof, in an amount in excess of $25,000.00, together with interest thereon at the legal rate;

AS TO THE SEVENTH CAUSE OF ACTION AGAINST ALL DEFENDANTS:

15. For an order requiring defendants, and each of them, to show cause, if any they have, why they should not be enjoined as hereinafter set forth, during the pendency of this action;

16. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendants from making, disseminating, or causing to be made or disseminated advertising which includes plaintiff's motion pictures, awards, nominations, and screen credits in their solicitations for business;

17. For damages according ~~to~~ proof;

AS TO THE EIGHTH CAUSE OF ACTION AGAINST DEFENDANTS WEDDINGTON AND ANDERSON, AND DOES 1 THROUGH 20, INCLUSIVE:

18. For damages according to proof, in an amount in excess of $25,000.00, together with interest thereon at the legal rate;

AS TO THE NINTH CAUSE OF ACTION AGAINST DEFENDANTS WEDDINGTON AND ANDERSON, AND DOES 1 THROUGH 20, INCLUSIVE:

19. For specific performance of the written contract requiring defendants to allow plaintiff to use the Library described in the Agreement;

AS TO THE TENTH CAUSE OF ACTION AGAINST ALL DEFENDANTS:

20. For an order requiring defendants, and each of them, to show cause, if any they have, why they should not be enjoined, during the pendency of this action;

21. For a temporary restraining order, a preliminary injunction, and a permanent injunction, compelling defendants to deliver to plaintiff all copies of the Library in their possession, and precluding defendants from soliciting or providing sound production services to all clients of plaintiff.

AS TO THE ELEVENTH CAUSE OF ACTION AGAINST ALL DEFENDANTS:

22. For all copies of the Library in the possession of defendants;

23. For damages according to proof, in an amount in excess of $25,000.00, together with interest thereon at the legal rate;

AS TO THE TWELFTH CAUSE OF ACTION AGAINST ALL DEFENDANTS:

24. For an order that the defendants, and each of them, to show cause, if any they have, why they should not be enjoined and compelled as hereinafter set forth, during the pendency of this action;

25. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendants from soliciting or providing sound production services to all clients and potential clients of plaintiff by the use of the Library, and compelling defendants to deliver to plaintiff all copies of the Library in their possession;

AS TO THE THIRTEENTH CAUSE OF ACTION AGAINST ALL DEFENDANTS:

26. For an order that the defendants, and each of them, to show cause, if any they have, why they should not be enjoined, during the pendency of this action;

27. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendants from soliciting or providing sound production services to all clients and potential clients of plaintiff by the use of the Library, and compelling defendants to deliver to plaintiff all copies of the Library in their possession;

AS TO THE FOURTEENTH CAUSE OF ACTION AGAINST DEFENDANTS WEDDINGTON AND DOES 1 THROUGH 20, INCLUSIVE:

28. For the principal sum of $15,076.51, plus interest thereon at the legal rate until the date of judgment;

AS TO THE FIFTEENTH CAUSE OF ACTION AGAINST DEFENDANTS WEDDINGTON AND DOES 1 THROUGH 20, INCLUSIVE:

29. For the principal sum of $15,076.51, plus interest thereon at the legal rate until the date of judgment;

AS TO THE SIXTEENTH CAUSE OF ACTION AGAINST DEFENDANTS WEDDINGTON AND DOES 1 THROUGH 20, INCLUSIVE:

30. For the principal sum of $15,076.51, plus interest thereon at the legal rate until the date of judgment;

AS TO THE SEVENTEENTH CAUSE OF ACTION AGAINST ALL DEFENDANTS:

31. For damages according to proof, in an amount in excess of $25,000.00, together with interest thereon at the legal rate;

32. For exemplary damages;

AS TO THE EIGHTEENTH CAUSE OF ACTION AGAINST ALL DEFENDANTS:

33. For damages according to proof, in an amount in excess of $25,000.00, together with interest thereon at the legal rate;

34. For exemplary damages;

AS TO THE NINETEENTH CAUSE OF ACTION AGAINST ALL DEFENDANTS:

35. For an accounting to ascertain the amount dues to plaintiff from defendants;

36. For judgment, after the accounting, for the amounts showing due and owing from defendants to plaintiff;

AS TO ALL CAUSES OF ACTION AGAINST ALL DEFENDANTS:

37. For plaintiff's reasonable attorneys' fees, costs, and expenses of suit; and

38. For such other, further, and additional relief as this Court deems just and proper.

Dated: February 23, 1996

/s/ Nancy A. Lee
NANCY A. LEE
SCHNEIDER & SHAFFER
Attorneys for Plaintiff
Stephen Hunter Flick

R. APP. 8

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

(Filed May 14, 1996)

WEDDINGTON PRODUCTIONS, INC., a California Corporation, Plaintiff, v. STEPHEN FLICK, an individual, STEVE FLICKS CREATIVE CAFE, a purported corporation, DEAN BEVILLE, an individual; and DOES 1 through 75, Inclusive, Defendants.	) CASE NO. BC140 705)) EX PARTE APPLICATION OF PLAINTIFF (WITH RESPECT TO VIOLATION BY DEFENDANTS STEPHEN FLICK AND STEVE FLICK'S CREATIVE CAFE OF PRELIMINARY INJUNCTION) FOR:)) (1) ISSUANCE OF OSC RE CONTEMPT;)) (2) MONETARY SANCTIONS PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE § 177.5;

(3) ATTORNEYS' FEES AND COSTS PURSUANT TO CALIFORNIA RULE OF COURT 227; AND

(4) ORDER REQUIRING DEFENDANTS TO DELIVER SOUND LIBRARY TO PLAINTIFF;

REQUEST FOR SANCTIONS AND ATTORNEYS' FEES; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF RICHARD ANDERSON AND THEODORE A. COHEN (INCLUDING DECLARATION OF EX PARTE NOTICE)

Date: May 14, 1996
Time: 8:30 a.m.
Dept.: 85

TO THE HONORABLE ROBERT H. O'BRIEN, LOS ANGELES SUPERIOR COURT JUDGE:

Plaintiff Weddington Productions, Inc., ("Weddington") hereby applies ex parte, with respect to the violation by defendants Stephen Flick ("Flick") and Steve Flick's Creative Cafe ("Cafe," and collectively with Flick, the "Enjoined Parties") of a preliminary injunction previously entered by this Court, for: (1) Issuance of OSC Re Contempt; (2) monetary sanctions pursuant to California

Code of Civil Procedure § 177.5; (3) Attorneys' fees and costs pursuant to California Rule of Court 227; and (4) An Order requiring defendants to deliver Sound Library to Plaintiff (the "Application").

The grounds for the Application are as follows:

(a) On February 5, 1996, this Court's preliminary injunction (the "Injunction") against, among others, the Enjoined Parties took effect, and the Enjoined Parties were, among other things, prohibited from utilizing Weddington's sound effects library ("the Sound Library");

(b) On March 5, 1996, the Enjoined Parties' counsel, authorized to accept service of the Injunction on behalf of the Enjoined Parties, accepted service of the Injunction on behalf of the Enjoined Parties;

(c) On March 24, 1996 and March 28, 1996, in violation of the injunction, which is a prohibitory injunction, the Enjoined Parties willfully utilized the Sound Library in violation of the Injunction;

(d) Pursuant to California Code of Civil Procedure §§ 1209 et seq. and Los Angeles Superior Court Local Rule 9.3, (i) Weddington has established that the Enjoined Parties are in contempt of the Injunction, and (ii) the Enjoined Parties should be fined $1,000, and Flick should be imprisoned for five days;

(e) Pursuant to California Code of Civil Procedure § 177.5, the Enjoined Parties shall be sanctioned $1,500, payable to Los Angeles County, for violating the Injunction without good cause or substantial justification;

(f) Pursuant to California Rule of Court 227, the Enjoined Parties should be ordered to pay Weddington's

reasonable expenses and counsel fees with respect to the Application in the amount of $3,006 due to the Enjoined Parties' failure to comply with the Injunction without good cause; and

(g) Based upon (i) the Court's order to the Enjoined Parties to turn over the Sound Library to Weddington (part of the Injunction), and (ii) the Enjoined Parties' violation of the Injunction by utilizing the Sound Library (and not by failing to turn over the Sound Library to Weddington), this Court should again order the Enjoined Parties to turn over the Sound Library, originals and copies, and any portion thereof, to Weddington.

The Application is based upon the accompanying Memorandum of Points and Authorities, the accompanying Declarations of Richard Anderson and Theodore A. Cohen, the papers and pleadings on file in this action and any and all argument and evidence presented at the hearing on the Application.

DATED: May 13, 1996

TOM LALLAS
THEODORE A. COHEN
LEVY, SMALL & LALLAS
A Partnership Including
Professional Corporations

By /s/ Theodore A. Cohen
Theodore A. Cohen
Attorneys for Weddington
Productions, Inc.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

By way of this Application, plaintiff Weddington Productions, Inc., ("Weddington") seeks to hold defendants Stephen Flick ("Flick") and Steve Flick's Creative Cafe ("Cafe", and collectively with Flick the "Enjoined Parties") in contempt for their repeated violations of a prohibitory injunction issued by this Court (the "Injunction") which, among other things, precluded, among others, the Enjoined Parties from utilizing Weddington's sound library, which contains sound effects belonging to Weddington that Weddington utilizes in its sound effects and sound editing services business (the "Sound Library").

Weddington also seeks the imposition of monetary sanctions payable to the County and attorneys' fees and costs payable to Weddington against the Enjoined Parties under controlling California law. Finally, Weddington seeks an order from this Court requiring the Enjoined Parties to immediately turn over to Weddington all originals and/or copies of the Sound Library or any portion thereof, in their possession or control.

As set forth below, Weddington has established all of the elements with competent evidence necessary for this Court to hold the Enjoined Parties in contempt of the Injunction and, more particularly, that the Enjoined Parties have violated the Injunction, a lawful order of this Court, by their continued use of the Sound Library. Therefore, Weddington respectfully requests that the Court (i) issue an OSC Re Contempt and set the matter for trial, (ii) order each of the Enjoined Parties to pay $1,500 to Los Angeles County, (iii) order the enjoined parties to pay Weddington its reasonable attorneys' fees and costs in the amount of $3,006, and (iv) order the Enjoined Parties to turn over all originals and/or copies of the Sound Library in their control or possession, or any portion thereof.

II. FACTS

A. Weddington

Weddington is owned by three shareholders, each of whom owns 1/3 of Weddington's shares (Anderson Dec. ¶3). The three shareholders are Flick, Mark Mangini ("Mangini"), and Richard Anderson ("Anderson") (Anderson Dec. ¶3).

Weddington is a production company engaged in the business of providing sound editing and sound effects services for, among other things, feature length motion pictures, movies made for television, television programs, commercials, and other entertainment programs ("Sound Production") (Anderson Dec. ¶4). Weddington has established a preeminent reputation as a Sound Production company in the sound production business (Anderson Dec. ¶4).

B. The Sound Library

Weddington's most valuable asset is its sound effects library (the "Sound Library") (Anderson Dec. ¶5). The Sound Library is the physical source of the sound effects and the sound editing services that Weddington provides (Anderson Dec. ¶5).

The Sound Library is stored on a digital master tape and other media (collectively the "Master Tape"), and various copies of the Master Tape have been made by Weddington (Anderson Dec. ¶6). Weddington holds all right, title and interest in and to the Sound Library (Anderson Dec. ¶6). Weddington uses the Sound Library to provide its services and make a profit (Anderson Dec. ¶¶7-14). The Sound Library is not available outside of Weddington, and is a state of the art catalog of sound effects (Anderson Dec. ¶¶15-17).

C. Flick Resigns From Weddington and Misappropriates The Sound Library

In July, 1995, Flick resigned from Weddington and started a new sound editing and sound effects services

company, i.e., Cafe (Anderson Dec. ¶18). Cafe is a competitor of Weddington (Anderson Dec. ¶18). When Flick left Weddington and started Cafe, he took with him a substantial portion of the Sound Library (originals and copies) to utilize in Cafe without Weddington's consent (Anderson Dec. ¶¶9, 19).

D. The Granting of the Injunction

Based in part upon Flick's and Cafe's misappropriation of the Sound Library, Weddington filed this action and a Motion for a Preliminary Injunction to, among other things, (i) enjoin Flick and Cafe from using the Sound Library and (ii) require Flick and Cafe to turn over any and all copies of the Sound Library or any portion thereof in their possession to Weddington (Anderson Dec. ¶20). In response, Flick argued, among other things, that (i) the Sound Library does not belong to Weddington (but rather to each of Weddington's shareholders as tenants in common or to Flick individually) and (ii) Weddington contractually agreed to allow Flick to use the Sound Library (Anderson Dec. ¶20). After Weddington rebutted Flick's arguments by presenting evidence to the contrary, the Court agreed with Weddington, rejected Flick's arguments, and granted Weddington's motion for a preliminary injunction (Anderson Dec. ¶20; Cohen Dec. ¶¶4, 7).

E. The Making Of The Order

The Injunction prohibits, among others, Flick and Cafe from utilizing the Sound Library and orders Flick and Cafe to turn over all originals and copies of the Sound Library or any portion thereof in their possession

to Weddington (Anderson Dec. ¶20). The Court granted the motion for preliminary injunction on January 29, 1996, and the Injunction became effective on February 5, 1996 (Cohen Dec. ¶¶7-10).[1]

F. Flick and Cafe's Knowledge of the Injunction

On March 5, 1996, the Enjoined Parties' counsel, authorized to accept service of the Injunction on behalf of the Enjoined Parties, executed Notices and Acknowledgments of Receipt on behalf of both Cafe and Flick for the Injunction (Cohen Dec. ¶12). The Notices and Acknowledgments of Receipt were filed with the Court on March 6, 1996 (Cohen Dec. ¶12).

G. Flick And Cafe Are Able To Comply With The Injunction Yet Willfully Disobeyed The Injunction

The Injunction, among other things, prohibits the Enjoined Parties from utilizing the Sound Library. The Sound Library consists of, among other things, specific sound effects owned by Weddington.

The Enjoined Parties provided the sound effects for the motion picture "Twister" (Anderson Dec. ¶24). "Cue

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[1] As set forth in the Cohen Declaration (¶¶7-10), the Court instructed Weddington to file a bond by February 1, 1996. The Court, however, did not mail the Minute Order in which it instructed Weddington to file the bond until February 1, 1996, and Weddington did not receive the order until the next day, February 2, 1996. Weddington filed the bond with the Court first thing in the morning on the very next business day, Monday, February 5, 1996.

Sheets" (logs of sound effects used in movies) from March 24 and 28, 1996 from "Twister" (Anderson Dec., Exhibit "A") describe some of the specific sound effects that the Enjoined Parties used on "Twister" (Anderson Dec. ¶¶22-25). The sound effects are identified on the Cue Sheets by their name and catalog number (from whatever catalog they come) (e.g., Weddington's Sound Library or some other source) (Anderson Dec., Exhibit "A" ¶25).

The Sound Library identifies Weddington's sound effects by name and catalog number (Anderson Dec., Exhibit "B", ¶27). By comparing the sound effects on the Cue Sheets to the excerpts from the Sound Library attached to the Anderson Declaration, it is apparent that on March 24 and 28, 1996, approximately 3 weeks after service of the Injunction, the Enjoined Parties utilized sound effects from the Sound Library for "Twister" in violation of the Injunction (Anderson Dec. ¶28).

The sound effects in the Sound Library identified on the Cue Sheets became part of the Sound Library while Flick was still at Weddington (Anderson Dec. ¶28). The sound effects in the Sound Library also identify the specific motion picture pursuant to which they were created (Anderson Dec. ¶29).

H. Weddington Has Incurred $3,006 in Attorneys' Fees

As set forth in the Cohen Declaration, Weddington reasonably has incurred $3,006 in attorneys' fees and costs in bringing this Application.

III. ARGUMENT

A. The Court Should Issue An OSC Re Contempt For The Enjoined Parties' Violation Of The Injunction

California Code of Civil Procedure ("CCP") §§ 1209 et seq., and Los Angeles Superior Court Local Rule ("LASCLR") 9.33 govern contempts. Pursuant to CCP § 1209(a)(5), disobedience of any lawful order of the Court constitutes a contempt of the authority of the Court. Pursuant to CCP § 1211, when the contempt is not committed in the immediate view and presence of the Court (an indirect contempt), an affidavit shall be presented to the court of the facts constituting the contempt.

Pursuant to LASCR [sic] 9.33(a), indirect contempt proceedings are initiated by the filing of affidavits stating the facts constituting the alleged contempt. As set forth below, the appended declarations of Richard Anderson and Theodore A. Cohen establish the four elements required under LASCLR 9.33(a).

Pursuant to LASCLR 9.33(b), an OSC re contempt may issue upon ex parte application if the moving party has complied with the notification requirements of Rule 9.37. As set forth in the appended Cohen Declaration, Weddington has provided ex parte notice of the Application to the Enjoined Parties. Further, the Order to Show Cause must issue if the affidavits are sufficient. As set forth below, the affidavits are sufficient.

1. The Making Of The Order

As set forth in the Cohen Declaration (¶¶5-10), this Court issued its ruling granting the Injunction on January

29, 1996. While the Court indicated in its minute order that Weddington was to file a bond by 4:00 p.m. on February 1, 1996, in the amount of $25,000, the Court did not mail its ruling to Weddington until February 1, 1996, and Weddington did not receive the order until the next day, Friday, February 2, 1996. Immediately upon receiving the ruling, Weddington took steps to obtain the bond, and filed it with the Court first thing in the morning on the next business day, Monday, February 5, 1996.[2] Thus, the injunction was made, and became effective.[3]

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[2] Weddington did everything within its power to file the bond as soon as it received notice that the Injunction had been granted and that a $25,000 bond was required to be filed. Weddington could not have filed the bond any earlier than it did, and the Enjoined Parties have suffered no prejudice as a result thereof because by the time they engaged in conduct which violated the Injunction, the bond had been filed and the Injunction had taken effect. In *Stewart v. Justice Court*, 7 Cal.App.2d 61, 45 P.2d 424 (1935), a party seeking a writ of attachment attempted to comply with the undertaking requirement by depositing with the court a personal check in lieu of an undertaking. The statute, however, required the filing of an undertaking. The court concluded that the moving party had "substantially and sufficiently" complied with the requirement because the personal check was as good as an undertaking. The moving party made an attempt to comply with the statute. Analogously, in this case, Weddington has done all that it could to comply with the Court order, and filed the undertaking as soon as possible. Further, the Enjoined Parties suffered no prejudice. Like the moving party in *Stewart*, Weddington substantially and sufficiently complied with this Court's Minute Order when it filed the bond.

[3] The Enjoined Parties' appeal of the Injunction does not automatically stay the effectiveness of the Injunction insofar as the Injunction prohibits the Enjoined Parties from utilizing the Sound Library because this aspect of the Injunction clearly is

2. Flick Had Knowledge of the Injunction

As set forth in the Cohen Declaration (¶¶11-12 and Exhibit "E" and "F"), on March 5, 1996, Nancy Lee, Esq. of Schneider & Shaffer, counsel for the Enjoined Parties and the person authorized to accept service on their behalf, executed Notices of Acknowledgment and Receipt of the Injunction on behalf of the Enjoined Parties. In *People v. Superior Court for County of Los Angeles*, 239 Cal.App.2d 99, 48 Cal.Rptr. 445, 448-49 (1965), the Court held:

> The law does not require that a party subject to an order of the Court must be personally served with a copy of that order before he may be held in contempt of it. All that the law requires is that he had knowledge of it. Proof of service of the order upon defendants' attorney is sufficient to raise the disputable presumption that the attorney had performed his duty and communicated his knowledge of the order to his client.

In *People*, the contemnor's attorney was merely served with the relevant document. By contrast, in this case, the Enjoined Parties' counsel was authorized to accept service of the Injunction on behalf of the Enjoined

---

prohibitory rather than mandatory. Under California law, prohibitory injunctions are not automatically stayed pending appeal. The enjoined party must either seek a stay order in the trial court or a writ of supersedes from the appellate court. *Rubin v. American Sportsmen Television Equity Society, Inc.*, 102 Cal.App.2d 288, 290, 227 P.2d 303 (1951). The Enjoined Parties have neither sought a stay order from this Court nor a writ of supersedes from the appellate court.

Parties, and did so. Thus, counsel's knowledge is imputed to the Enjoined Parties.

Weddington certainly has made a prima facie case that the Enjoined Parties had knowledge of the Injunction. Pursuant to LASCLR 9.33(b), since Weddington has established its prima facie case, the OSC re Contempt must be issued.

3. The Enjoined Parties Were And Are Able to Comply With The Injunction

As set forth in the Anderson Declaration (¶¶21-29), the Enjoined Parties were and are able to comply with the Injunction. The Sound Library contains specific sound effects defined by name, number and the effects themselves. That is, each sound effect is identified by name and number. Each sound effect is part of the Sound Library.

The Injunction, among other things, prohibits the Enjoined Parties from using the sound effects in the Sound Library. Thus, the terms of the Injunction are clear and unambiguous. Among other things, the Enjoined Parties may not utilize the sound effects in the Sound Library.

4. The Enjoined Parties Willfully Disobeyed The Injunction

The Injunction became effective at the latest on March 5, 1996 when it was served. As set forth in the Anderson Declaration (¶¶21-29), approximately three weeks later (on March 24 and 28, 1996), the Enjoined

Parties violated the Injunction by utilizing at least 18 sound effects from the Sound Library. Thus, the Enjoined Parties disobeyed the Injunction.

Next, the disobedience was willful. First, this Court reasonably may infer that the Enjoined Parties' disobedience was willful. The sound effects in the Sound Library are clearly defined, and there can be no dispute that the Enjoined Parties intentionally used the sound effects from the Sound Library reflected on the Cue Sheets. Since the Enjoined parties knew that they were prohibited from utilizing the sound effects in the Sound Library and since the Enjoined Parties had to have used sound effects from the Sound Library intentionally, the Court necessarily must infer that the Enjoined Parties used the sound effects from the Sound Library identified on the Cue Sheets in willful disobedience of the Injunction.

Second, many of the sound effects from the Sound Library identified on the Cue Sheets were created and became part of the Sound Library years before Flick left Weddington, and all of the sound effects from the Sound Library identified on the Cue Sheets were created and became property of the Sound Library before Flick left Weddington. Further, each sound effect was associated with a specific motion picture. Thus, Flick had to have known that the sound effects on the Cue Sheets that are part of the Sound Library were indeed part of the Sound Library. Notwithstanding such knowledge, and knowledge of the Injunction, the Enjoined Parties nonetheless utilized the Sound Library in willful disobedience of the injunction. On these bases, the Court should issue an OSC Re Contempt and set this matter for trial.

B. Pursuant To CCP § 177.5, The Enjoined Parties Shall Be Sanctioned $1,500, Payable to Los Angeles County, For Violating the Injunction Without Good Cause or Substantial Justification

CCP § 177.5 provides in relevant part:

> A judicial officer shall have the power to impose reasonable money sanctions, not to exceed $1,500, notwithstanding any other provision of law, payable to the County in which the judicial officer is located, for any violation of a lawful court order by a person, done without good cause or substantial justification.

This Court clearly is a judicial officer. The Injunction clearly is a lawful court order. Pursuant to CCP § 177.5, "person" includes a corporation as well as a natural person. Flick is a natural person and Cafe is a purported corporation. Therefore, both Flick and Cafe are subject to CCP § 177.5.

As set forth above, the Enjoined Parties have violated the Injunction by, among other things, utilizing the Sound Library.[4] Thus, this Court should impose a $1,500 sanction on Flick and a $1,500 sanction on Cafe, payable to Los Angeles County.

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[4] The Injunction also orders the Enjoined Parties to, among other things, turn over all originals and copies of the Sound Library in their possession to Weddington within five days. While the Enjoined Parties have not complied with this aspect of the Injunction, Weddington does not seek to hold the Enjoined Parties in contempt for such violation, nor does Weddington seek the imposition of sanctions or attorneys' fees for failure to turn over the Sound Library within five days in violation of the Injunction.

C. Pursuant to California Rule of Court 227, The Enjoined Parties Should Be Ordered to Pay Weddington's Reasonable Expenses and Counsel Fees For Failing To Comply With The Injunction Without Good Cause

California Rule of Court 227 provides in relevant part that:

> The failure of any person to comply with [an] . . . order of the court, unless good cause is shown, . . . is an unlawful interference with the proceedings of the court. The court may order the person at fault to pay the opposing party's reasonable expenses and counsel fees and to reimburse or make payment to the County . . . in addition to any other sanction permitted by law.

For the same reasons set forth above with respect to the Enjoined Parties' contempt, the Enjoined Parties have failed to comply with the Injunction, and have done so without good cause. Therefore, the Court should order the Enjoined Parties to pay Weddington's attorneys' fees and costs incurred in bringing the Application in the amount of $3,006 (Cohen Dec. ¶¶13-31).[5]

---

[5] In *Caldwell v. Samuels Jewelers*, 222 Cal.App.3d 970, 979, 272 Cal.Rptr. 126, 131 (1990), the Court held, "that whenever sanctions are awarded *to the County* pursuant to Rule 227 as a penalty for violating a court order, the maximum permissible sanction shall be $1,500, i.e., the amount set forth in [CCP] Section 177.5 (Emphasis added)." The court reached this conclusion based upon the statement of law that "Courts may not make rules inconsistent with law." *Id.* This holding does not in any way limit this Court's authority to award Weddington its reasonable attorneys' fees even though they exceed $1,500. CCP § 177.5 applies only to sanctions payable to the County. While

D. This Court Should Order The Enjoined Parties To Turn Over The Sound Library Based Upon Their Continued Use Of The Sound Library In Violation Of The Injunction

In addition to prohibiting the Enjoined Parties from utilizing the Sound Library, the Injunction ordered the Enjoined Parties to turn over the portion of the Sound Library in their possession to Weddington within five days. While Weddington, by way of this Application, requests that this Court order the Enjoined Parties once again to turn over any and all originals and copies of the Sound Library or any portion thereof in their possession to Weddington, the basis for such an order is *not* the failure of the Enjoined Parties to comply with the portion of the Injunction that required the Enjoined Parties to turn over the Sound Library to Weddington. Rather, Weddington bases its requests on two independent bases. First, in issuing the Injunction, this Court already has concluded that the Enjoined Parties, among others, are not entitled to have in their possession any originals or copies of the Sound Library, or any portion thereof. Since the Enjoined Parties utilized the Sound Library on March

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§ 177.5 certainly would prohibit this Court from imposing sanctions payable to the *county* in excess of $1,500, notwithstanding CRC 227 which contains no such limit, CCP § 177.5 contains no reference to the award of attorneys' fees to a private party. Therefore, since CRC 227 gives the court the power to award an unlimited amount of reasonable attorneys' fees *in addition to any other sanction permitted by law*, this court has the authority to, and should, award Weddington attorneys' fees and costs in the amount of $3,006 against the Enjoined Parties for violating the Injunction.

24 and 28, 1996, the Enjoined Parties obviously wrongfully have possession of at least a portion of the Sound Library.

Second, as set forth above, Weddington has now established that irrespective of whether the Enjoined Parties wrongfully were utilizing the Sound Library prior to this Court's issuance of the Injunction (the Enjoined Parties were indeed making such use based upon the Court's issuance of the Injunction), the Enjoined Parties in willful disobedience of the Injunction continued to use the Sound Library after issuance and service of the Injunction. Therefore, this Court should order the Enjoined Parties to turn over to Weddington immediately any and all originals and/or copies of the Sound Library in their possession or control, or any portion thereof.[6]

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[6] As set forth above, notwithstanding the Enjoined Parties' appeal of the injunction, irrespective of whether the filing of the appeal exonerated the Enjoined Parties from complying with the portion of the Injunction that required them to turn over the Sound Library to Weddington *based upon the Injunction*, it did not exonerate the Enjoined Parties from the prohibition from utilizing the Sound Library. Nonetheless, the Enjoined Parties continued to use the Sound Library thereafter. Since the Enjoined Parties are not complying with the portion of the Injunction that prohibits them from utilizing the Sound Library, they should be ordered to turn over to Weddington the Sound Library (irrespective of the portion of the Injunction that requires the Enjoined Parties to turn over the Sound Library to Weddington).

IV. CONCLUSION

As set forth above, the Enjoined Parties are in contempt of the Injunction. Weddington has made a prima facie case establishing each of the four elements. Therefore, this Court is required to issue an OSC Re Contempt and set the matter for trial. Further, independent of the contempt, the Enjoined Parties have failed to comply with a lawful court order without good cause or substantial justification, and under controlling California law, this Court should order each of the Enjoined Parties to pay $1,500 to Los Angeles County, and should order the Enjoined Parties to pay Weddington its reasonable attorneys' fees and costs in the amount of $3,006. Finally, the Court should order the Enjoined Parties to immediately turn over to Weddington all originals and/or copies of the Sound Library in their possession or control, or any portion thereof.

DATED: May 13, 1996

LEVY, SMALL & LALLAS
A Partnership Including
Professional Corporations

By Theodore A. Cohen
THEODORE A. COHEN
Attorneys for Weddington
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R. APP. 9

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

WEDDINGTON PRODUCTIONS, INC., a California corporation, Plaintiff, vs. STEPHEN FLICK, an individual, STEVE FLICK'S CREATIVE CAFE, a purported corporation, DEAN BEVILLE, an individual; and DOES 1 through 75, Defendants.	CASE NO. BC140705 MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION OF ROBERT L. BECKING IN OPPOSITION TO APPLICATION FOR ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION DATE: May 14, 1996 TIME: 8:30 a.m. DEPT: 85 MOTION CUT-OFF DATE: None. DISCOVERY CUT-OFF DATE: None. TRIAL DATE: None.

COMES NOW DEFENDANTS AND IN OPPOSITION TO PLAINTIFF'S EX PARTE APPLICATION FOR ORDER TO SHOW CAUSE RE CONTEMPT SUBMITS THE FOLLOWING:

I

THE ORDER GRANTING THE INJUNCTION IS STAYED BY THE FILING OF THE NOTICE OF APPEAL

An injunction which is mandatory in character is automatically stayed on appeal. (Code of Civil Procedure section 916(a); *Agricultural Labor Relations Board v. Kern County Superior Court* (1983) 149 Cal.App.3d 709, 716 [196 Cal.Rptr. 920, 925]; *Paramount Pictures Corporation v. Bette Davis* (1964) 228 Cal.App.2d 827, 835 [39 Cal.Rptr. 791, 796].) Code of Civil Procedure section 916 states:

> "(a) Except as provided in Sections 917.1 to 917.9, inclusive, and in Section 116.810, the perfecting of an appeal stays proceedings in trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order."

Sections 917.1 to 917.9 and section 116.80 are not applicable in this case.

In the *Agricultural Labor Relations Board* case, the Court stated that "California has had the rule that an appeal automatically stays mandatory injunctions for more than one hundred years." (At 149 Cal.App.3d 709,

716 [196 Cal.Rptr. 920, 925].) Similarly, the Court in Paramount Pictures Corporation stated,

> "It is well settled that an injunction mandatory in character is automatically stayed on appeal and that a prohibitory injunction is not so stayed (*Byington v. Superior Court*, 14 Cal.2d 68, 70 [92 P.2d 896]; *City of Pasadena v. City of Alhambra*, 75 Cal.App.2d 91, 95 [170 P.2d 499]), 'the object of the rule in both cases being to preserve the *status quo*. Otherwise the result of the final adjudication might often be a barren victory.' (*Dewey v. Superior Court*, 81 Cal. 64, 68 [22 P. 333].) 'The character of an injunction, however, and whether it is prohibitive or mandatory in its operation upon the parties whom it affects, is determined not so much by the particular designation given to it by the court directing its issuance, as by the nature of its terms and provisions, and the effect upon the parties against whom it is issued. . . . As a general rule, we think we may say that when the injunction merely grants preventive relief it is prohibitive, but when it directly or indirectly grants affirmative relief it is mandatory.' (*Ohaver v. Fenech*, 206 Cal. 118, 122 [273 P. 555].) As stated in *Musicians Club of Los Angeles v. Superior Court*, 165 Cal.App.2d 67, 71 [331 P.2d 720]: 'An order enjoining action by a party is prohibitory in nature if its effect is to leave the parties in the same position as they were prior to the entry of the judgment. On the other hand, it is mandatory in effect if its enforcement would be to change the position of the parties and compel them to act in accordance with the judgment rendered.' "

The injunction requires defendants to turn over to plaintiff personal property described as the Sound Effects Library. Therefore, the injunction requires a mandatory action on the part of defendants. As a mandatory injunction is stayed upon the filing of a Notice of Appeal, defendants are not required to turn over any property to plaintiff.

The injunction also requires that plaintiff discontinue his alleged use of a Sound Effects Library which defendants maintain he is using to their detriment. Inasmuch as this purports to change the status quo, the injunction is mandatory and stayed upon appeal.

II

AS THE INJUNCTION IS NOT ENFORCEABLE, AN ORDER TO SHOW CAUSE RE CONTEMPT CANNOT BE ISSUED

The California Practice Guide, Civil Procedure Before Trial, published by the Rutter Group, sets forth the following factors to be considered by a court with regard to enforceability of an injunction:

> "A court, mindful of its own dignity and credibility, is unlikely to issue injunctions which, as a practical matter, cannot be enforced. This consideration has several ramifications:
>
> (1) Mandatory injunctions are automatically stayed by an appeal and thus are rarely issued at the preliminary injunction stage.
>
> (2) Broad, vague, and generally phrased injunctions are avoided because contempt will not lie.

> (3) Injunctions as to acts not subject to objective verification are looked on with suspicion (e.g., enjoining co-defendants in an unfair competition case from "passing information to each other" about plaintiff's business.)
>
> . . .
>
> "(1) Few cases involve only one of the above considerations. Instead, a medley of the considerations will be rattling around in the judge's head and the balance will be drawn." *California Practice Guide, Civil Procedure Before Trial,* Chapter 9, page 9 (11-13), the Rutter Group, Judge Robert I. Weil and Judge Ira A. Brown, Jr.

Each of the factors described above by Jude [sic] Weil and Judge Brown are present in the case at bar. The injunction is a mandatory injunction and therefore is stayed by the appeal. The language found in the injunction is ambiguous and vague and the prohibitive acts are simply not subject to objective verification. We are dealing here with the use of a particular sound effect. A particular sound effect can be obtained from many and several sources. The use of DAT numbers is not particular to any sound effect and DAT numbers can be used by everyone to describe anything. They are not particular to the sound effects industry, they are not particular to the indexing of sound effects by the sound effects industry.

III

THE DELAY IN PLAINTIFF SEEKING TO ENFORCE ITS PURPORTED PRELIMINARY INJUNCTION SHOWS THAT THERE WAS NO IRREPARABLE HARM IN SEEKING THE INJUNCTION. THEREFORE, NO ORDER TO SHOW CAUSE SHOULD ISSUE.

The representatives of the plaintiff in this matter, Mark Mangini and Richard Louis Anderson, stated in their Declarations of *December 12, 1995*, that the defendants were allegedly using the sound effects library on the film "Twister." Now, five months later, the plaintiff decides to attempt to enforce a Preliminary Injunction that has not been properly issued when the plaintiff alleges that it has been suffering damages of over $500,000.00.

As noted, the Declarations were dated December 12, 1995, and nothing was done. The Order granting the Preliminary Injunction was issued on January 29, 1996, and nothing was done. The bond for the Preliminary Injunction was not filed in a timely manner, but was filed on February 5, 1996, and nothing was done. The copy of the Preliminary Injunction signed by the court was served on the parties on March 4, 1996, and nothing was done. Finally, some two months later, the plaintiff decides that it should bring an Application for an Order to Show Cause re Contempt. This delay by the plaintiff shows that no preliminary injunction should have issued, in the first instance, because there was no irreparable harm. The delay, constituting laches, is a valid and proper consideration for this court in not only issuing its order granting the preliminary injunction, but also in finding that there is no reason why an Order to Show Cause re Contempt

should be issued, at this point in time, as the plaintiff has done nothing to preserve its rights, if it had any. Both the case of *Youngblood v. Wilcox*, 207 Cal.App.3d 1368, 225 Cal.Rptr. 527, and the case of *Nutro Products, Inc. v. Cole Grain Co.*, 3 Cal.App.4th 868, 5 Cal.Rptr.2d 41, show that the argument of a delay or laches is appropriate in the context of preliminary injunctions.

IV

CONCLUSION

For each and all of the foregoing reasons, it is respectfully requested that the plaintiff's Application for Order to Show Cause re Contempt concerning the Preliminary Injunction should be denied summarily.

Dated:
May 13, 1996

/s/ Robert L. Becking
ROBERT L. BECKING
SCHNEIDER & SHAFFER
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R. APP. 10

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January 13, 1997

Joseph A. Lane, Clerk
Office of the Clerk
Court of Appeal, State of California
Second Appellate District
300 South Spring Street, 2nd Floor
Los Angeles, California 90013

Re: Weddington Productions, Inc. v. Flick, Stephen
Case No. 2 Civil B099986, Los Angeles No. BC140705

Dear Mr. Lane:

I have received your notice dated December 19, 1996 addressed to Schneider & Shaffer, who were former counsel for Mr. Flick in the within proceedings. I substituted into the case in the Superior Court in October of 1996. I did not receive your notice until December 30, 1996.

In am requesting an extension of time with respect to the briefing schedule for this appeal for several reasons. First, a number of issues raised in the appeal are already the subject matter of writ proceedings now going on in the California Court of Appeal and the California

Supreme Court. If relief is not obtained in the California Supreme Court, we anticipate seeking relief, again by way of writ, in the federal system. Second, both parties below contend that the case has been settled, although on different bases. These claims, too, should be resolved by the end of February, 1997.

When the writ proceedings described above and the disputes as to the nature of the settlement have been resolved, we will be in a better position to know whether this appeal is no longer necessary or has been rendered moot, in whole or in part. Accordingly, I ask that the date by which Appellant's Opening Brief be filed be continued until March 30, 1997, at which time we hope the above issues will have been fully resolved and the need for, and scope of, this appeal finally determined.

Thank you for your anticipated cooperation.

Very truly yours,

/s/ Thomas Doniger
Thomas Doniger

TD:pl

cc: Mr. Stephen Flick
Tom Lallas, Esq.

R. APP. 11

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 2 DATE: 02/28/97

Levy, Small & Lallas
Tom Lallas
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RE: Weddington Productions, Inc.
VS.
Flick, Stephen
2 Civil B099986
Los Angeles NO. BC140705

THE COURT:

APPL FOR EXT OF TIME TO FILE AOB GRANTED TO 5-12-97.

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(3)

Supreme Court, U.S.
FILED
JUN 11 1997
CLERK

No. 96-1772

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STEPHEN FLICK,

Petitioner,

vs.

WEDDINGTON PRODUCTIONS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION TWO

PETITIONER'S REPLY BRIEF

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1 *Nimmer on Copyright*,
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2 B.Witkin, California Procedure,
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I

ARGUMENT

A. This Is A Copyright Case.

In its brief, Respondent admits that the "substance" of its claim consists of "stealing the Sound Library and using it in the motion picture 'Twister'." Respondent's Brief at 9. [Emphasis added.] "Use" of the Sound Library in editing "Twister", as proved at the contempt trial, consisted of reproducing the copyrightable sounds contained in the Sound Library and altering such sounds to create derivative works. Thus, the "substance" of Respondent's claim consisted of the exercise of the specific enumerated rights of a copyright proprietor under 17 U.S.C. §106.

While state law may provide a remedy in conversion for "stealing the Sound Library", this remedy

addresses only the right to possession of the tangible tapes of which the Sound Library consists. However, the Injunction adjudicated not only rights to possession of such tapes but also the right to reproduce and alter the copyrightable sounds embodied in such tapes.

> ... The mere act of reproduction does not constitute conversion because reproduction constitutes an interference with the intangible literary or artistic property right, not with the tangible property right in the chattel that is being reproduced. ...
>
> It is generally held that an action for conversion will lie only for wrongful possession of a tangible embodiment of a work, (for instance, its manuscript), whereas a copyright action must be

> brought for wrongful use of the intangible artistic property (for instance, a poem or other literary work) contained therein. If, however, contrary to the usual view of conversion, it is regarded as encompassing unauthorized reproduction, than the rights created are indeed "equivalent" to copyright, and state law is preempted. 1 *Nimmer on Copyright*, §1.01[B][1][i] at pages 1-39 - 1-41

Similarly, Weddington's trade secret cause of action cannot support the injunction.[1] Where "use" of an

---

[1] It is undisputed that the Flick Parties had full knowledge and use of the Library prior to leaving Weddington for a period of many years. Thus, by taking a copy of the Library with them, there could not have been a disclosure to the Flick Parties of the Library, nor is it alleged that the Flick Parties disclosed the library to others. It is also not disputed that all of the parties to this litigation

alleged trade secret is at issue, as here, such claims are preempted. *Long v. Quality Computers and Applications, Inc.*, 860 F.Supp. 191, 197 (N.D. Pa. 1994) [Courts recognize two distinct types of misappropriation of trade secrets: Those based upon the use of a plaintiff's work and those based upon the disclosure of material that a defendant has a duty to keep confidential. (Citation) Typically, claims of the former type are preempted...] Accordingly, even if the Library constitute a trade secret and if the trade secret had not been fully disclosed, Weddington's claim for "use" of the Library would be preempted by the Copyright Act.

---

have "used" the Library for sound effects editing services for many years and, therefore, the Library, if a trade secret, was fully "disclosed" (if at all) prior to the Flick Parties' separation from Weddington. Thus, a trade secret claim based upon disclosure of secret material is not at issue. As Respondent admits, "use" of the Library, consisting of reproduction and alteration of the sounds contained therein, is the "substance" of its claim.

B. This Court Has Jurisdiction Under 28 U.S.C. §1257(a).

Under applicable California law, the contempt proceeding initiated against the Flick Parties was a separate, quasi-criminal proceeding independent of the underlying civil action in which the Injunction was issued. Unlike the appellate procedures available in the underlying civil action, there is no available appeal from an adjudication of contempt.

> The judgement and orders of the court or judge, made in cases of contempt, are final and conclusive. California Code of Civil Procedure §1222.

Petitioner sought review of his contempt

adjudication in the California Court of Appeal by Petition for Writ of Habeas Corpus, etc. and, after denial thereof, sought review in the California Supreme Court by Petition for Review, also denied. Accordingly, there is no further appellate procedure available within the California State Court system which can relieve Petitioner of his contempt adjudication.

Respondent argues that, because the validity of the injunction may be at issue in an appeal taken from the final judgment in the underlying civil action, "the California Supreme Court has not rendered a final judgment on the issue". Respondent's Brief at 13. This argument is incorrect because the outcome of an appeal from the final judgment in the underlying civil action cannot affect the final contempt adjudication in the separate quasi-criminal proceeding. Thus, even a

reversal of the trial court's issuance of the preliminary injunction will not relieve Petitioner of the contempt adjudication.

The United States Supreme Court has granted Certiorari in similar cases. See, *Local No. 438 Construction & Gen. Lab U. v. Curry*, 371 U.S. 542, 548, 83 S.Ct. 531, 9 L.Ed.2d 514 (1963). Here, the contempt adjudication in the separate quasi-criminal proceeding will survive regardless of the outcome on any appeal from the final judgment in the underlying civil action. Thus, this case satisfies the test of finality stated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328, (1975), approving certiorari in cases "in which the federal issue, finally decided by the highest court in the State will survive and require decision regardless of the outcome of future state court

proceedings." *Cox, supra*, 420 U.S. at 480, 95 S.Ct. at 1038.

C. The Issue As To The State Court's Lack of Subject Matter Jurisdiction Was Not Waived.

Respondent argues that Petitioner failed "to raise the copyright claim" and "should have timely removed the case to federal court". However, subject matter jurisdiction is never waived and may be raised at any stage in the proceedings because a party's conduct cannot invest a court with subject matter jurisdiction which it lacks.

> The very nature of subject matter jurisdiction, as a required element distinct

> from that of jurisdiction of the parties, indicates that it cannot be conferred by consent, waiver or estoppel. 2 B.Witkin, California Procedure, *Jurisdiction*, §10 at p.374 (3d Ed. 1985).

Under California Law, issues as to subject matter jurisdiction may even be raised for the first time on appeal. *Consolidated Theaters v. Theatrical Stage Employees Union*, 69 Cal.2d 713, 721, 73 Cal.Rptr. 213, 447 P.2d 325 (1968).

With respect to the other arguments raised in Respondent's Brief in Opposition, Petitioner relies on its petition.

II.

CONCLUSION

The Petition should be granted.

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Respectfully submitted,

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